(1) 03 221 AUG 8 - 2003

No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

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CHERYL K. PLILER, Warden of California State Prison - Sacramento, *Petitioner,*

v.

RICHARD HERMAN FORD, *Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. This Court held over twenty years ago that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. 509, 522 (1981). The question presented is:

Whether the dismissal of such a "mixed" habeas petition is improper unless the district court informs the petitioner about the possibility of a stay of the proceeding pending exhaustion of state remedies and advises the petitioner with respect to the statute of limitations in the event of any refiling.

2. Under Federal Rule of Civil Procedure 15(c), "[a]n amendment of a pleading relates back to the date of the original pleading when relation back is permitted by the law that provides the statute of limitations applicable to the action, or [¶] . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . ." The question presented is:

Whether a second, untimely habeas petition may relate back to a first habeas petition, where the first habeas petition was dismissed and the first proceeding is no longer pending.

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## IN THE SUPREME COURT OF THE UNITED STATES

No. _____

CHERYL K. PLILER, Warden of California State Prison - Sacramento, *Petitioner,*

**v.**

RICHARD HERMAN FORD, *Respondent.*

_____

## PETITION FOR WRIT OF CERTIORARI

Cheryl K. Pliler, Warden of California State Prison—Sacramento, at Represa, California (hereafter the Warden), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1/]

## OPINION OR JUDGMENT BELOW

The opinion of the Ninth Circuit is reported as *Ford v. Hubbard*, 305 F.3d 875 (9th Cir. 2002), *amended by* 330 F.3d 1086 (9th Cir. 2003), and is reproduced in pages A1 to A45 of the Appendix (App.) to this petition. The orders of the District Court denying habeas corpus relief are unreported and are reproduced in pages B1 to B8, C1 to C9, D1 to D5, and E1 to E7 of the Appendix. The opinions of the California Court of

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1. In the proceedings below, Warden Suzan Hubbard was listed as respondent Richard Herman Ford's custodian. Ford's present custodian is Cheryl K. Pliler.

Appeal certified for publication and partial publication are reported as *People v. Von Villas*, 11 Cal. App. 4th 175, 15 Cal. Rptr. 2d 112 (1992), and *People v. Von Villas*, 10 Cal. App. 4th 210, 13 Cal. Rptr. 2d 62 (1992), respectively.

## STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit affirming in part, vacating in part, and remanding with instructions, was amended and entered on May 15, 2003. The Ninth Circuit denied the Warden's petition for rehearing with suggestion for rehearing en banc on May 15, 2003. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

Section 2244 of Title 28 of the United States Code provides in pertinent part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.



Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
>
> (A) the applicant has exhausted the remedies available in the courts of the State . . . .

Rule 15 of the Federal Rules of Civil Procedure provides in pertinent part:

> (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when
>
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . .

## STATEMENT OF THE CASE

On October 11, 1988, respondent Richard Herman Ford and Anthony Von Villas, both former Los Angeles Police Department officers, were convicted of first-degree murder for financial gain and conspiracy to commit murder for killing small-business owner Thomas Weed (hereafter the Weed Case). After the jury deadlocked during the penalty phase of Ford's trial, the trial court sentenced him to life without the possibility of parole.

On November 16, 1992, in a published opinion, the California Court of Appeal affirmed the judgment of conviction as to Ford. *See Von Villas*, 11 Cal. App. 4th at 257-61, 15 Cal. Rptr. 2d at 162-65. Ford's petition for review in the California Supreme Court was denied. A petition for writ of certiorari was denied by this Court on October 4, 1993. *See Ford v. California*, 510 U.S. 838 (1993).

In a separate trial, Ford and Von Villas were also convicted of conspiracy to commit another murder; the charge named Joan Loguercio as the target (hereafter the Loguercio Case). In addition, Ford and Von Villas were convicted of two counts of attempted murder involving Loguercio, as well as robbery, conspiracy to commit robbery, and assault with a firearm. Ford alone was convicted of attempted administration of an intoxicating agent. On March 11, 1989, Ford received a sentence of thirty-six years to life.

On October 9, 1992, in a partially-published opinion, the California Court of Appeal affirmed the judgment of conviction. *See Von Villas*, 10 Cal. App. 4th at 274-75, 13 Cal. Rptr. 2d at 107. Ford's petition for review in the California Supreme Court was denied. A petition for writ of certiorari was denied by this Court on June 14, 1993. *See Ford v. California*, 508 U.S. 975 (1993).

On April 19, 1997, five days before the expiration of the one-year limitation period under the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter the AEDPA), *see* 28



U.S.C. § 2244, Ford signed and delivered to prison authorities a *pro se* petition for writ of habeas corpus challenging his conviction in the Weed Case; the petition was forwarded to the clerk and filed in the United States District Court for the Central District of California on May 5, 1997. In a judgment entered on October 14, 1997, the district court dismissed the petition without prejudice due to Ford's failure to exhaust his state remedies as to several claims. App. D1-D5. Prior to the dismissal, Ford was given the option of dismissing his unexhausted claims and proceeding on the exhausted claims, in an apparent attempt to avoid the application of the AEDPA's limitation period; Ford was also informed that any failure to respond to the court's inquiry would result in the dismissal of the petition. App. D1-D2. When Ford did not respond, the petition was dismissed without prejudice. App. D2-D5. No appeal was filed.

On the same day Ford submitted his petition in the Weed Case, he also signed and delivered to prison authorities a *pro se* petition challenging his conviction in the Loguercio Case; that petition was likewise filed in the United States District Court for the Central District of California on May 5, 1997. As in the Weed Case, the petition was unexhausted and the magistrate judge gave Ford the choice of dismissing the unexhausted claims and proceeding with only the exhausted claims, or suffering dismissal of the petition. App. E2-E4. Although Ford filed a motion to stay the proceedings pending exhaustion, he elected not to delete the unexhausted claims, but to dismiss the petition. App. E2. The petition was accordingly dismissed without prejudice in a judgment entered on September 12, 1997, after the expiration of the AEDPA's limitation period. App. E7. Again, no appeal was filed (the petitions filed in 1997 are collectively referred to hereafter as the First Petitions). Ford unsuccessfully sought relief in state court on his unexhausted claims after the First Petitions were dismissed.

On April 7, 1998, Ford returned to federal court and filed a second petition challenging his conviction in the Weed Case.

In a judgment entered on June 30, 1998, the district court dismissed the petition with prejudice as untimely under the AEDPA. App. C1-C9. A second petition challenging Ford's conviction in the Loguercio Case was filed the same day, and likewise dismissed with prejudice as untimely in a judgment entered on July 27, 1998 (the petitions filed in 1998 are collectively referred to hereafter as the Second Petitions). App. B1-B8.

Ford appealed the dismissals of the Second Petitions. The Ninth Circuit consolidated the appeals and granted Ford's request for a certificate of appealability "on the question whether his federal habeas petitions were timely under AEDPA's one-year statute of limitations . . . ." App. A21.

In a published decision authored by Judge Reinhardt and joined by Judge Pregerson, with Judge Silverman dissenting, the majority held that because "[t]he district court did not . . . inform Ford that it would not have the power to consider his motions to stay the [first] petitions unless he opted to amend them and dismiss the then-unexhausted claims," Ford's decision "to have his timely-filed federal habeas petitions dismissed without prejudice was an uninformed one . . . ." App. A14-A15. The majority also held that the district court erred by failing to advise Ford "that his federal claims would be time-barred, absent cause for equitable tolling, upon his return to federal court if he opted to dismiss the petitions 'without prejudice' and return to state court to exhaust all of his claims." App. A15. Finally, the majority held that because the dismissals of the First Petitions were therefore "improper," the claims that were included in the First Petitions and then reasserted in the Second Petitions were not time-barred under the AEDPA, but "relate[d] back to and preserve[d] the filing date of the initial petitions." App. A15.

The majority vacated the district court's dismissal of the Second Petitions insofar as they contained claims originally raised in the First Petitions, and remanded those claims for reconsideration on the merits. Five claims newly raised in the



Second Petitions were remanded for development of a factual record as to whether the statute of limitations should be equitably tolled. Finally, the majority affirmed the dismissal of two ineffective assistance of counsel claims raised for the first time in the second Loguercio Case. App. A40.

The Warden's petition for rehearing with suggestion for rehearing en banc in the Ninth Circuit was denied on May 15, 2003. App. A13.

On May 21, 2003, the Warden filed a motion to stay the issuance of the mandate in the Ninth Circuit. On May 28, 2003, the Ninth Circuit granted the motion.

## REASONS FOR GRANTING THE WRIT

### I.

**The Ninth Circuit has decided an important and recurring issue regarding the dismissal of mixed habeas petitions under *Rose v. Lundy* in a way that conflicts with decisions of this Court, promotes a stay and abeyance procedure of unlikely merit, places a significant burden on the district courts, and is inconsistent with decisions of other circuit courts of appeals.**

Disregarding over twenty years of Supreme Court precedent, the majority in this case holds for the first time anywhere that the dismissal of a mixed petition is "improper" and constitutes "prejudicial" error, unless a district court first informs a habeas petitioner that it does "not have the power to consider [any] motion[] to stay the petition[] unless he opt[s] to amend [it] and dismiss the then-unexhausted claims." App. A14. According to the majority, where such an advisement is not provided a petitioner's decision "to have his timely-filed federal habeas petitions dismissed without prejudice [is] an uninformed one . . . ." App. A15. This Court has never endorsed that approach. Instead, this Court has flatly held that "a district court *must* dismiss habeas petitions containing both

unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. at 522 (emphasis added). The advisement required by the majority in this case promotes the improper goal of stay and abeyance, a procedure which is inconsistent with the responsibilities that attend a federal court's assumption of jurisdiction over a case challenging a final state criminal conviction.

"Boldly going where no court has gone before," App. A42 (Silverman, J., dissenting), the majority also requires district courts to provide warnings about the AEDPA's limitation period before dismissing a mixed petition. Specifically, district courts must now advise a habeas petitioner "that his federal claims would be time-barred, absent cause for equitable tolling, upon his return to federal court if he opt[s] to dismiss the petition[] 'without prejudice' and return to state court to exhaust all of his claims." App. A15. Again, this Court has never required such warnings or advisements; nor has it ever held that their absence renders the dismissal of a mixed petition erroneous. *See Duncan v. Walker*, 533 U.S. 167, 178-79 (2001); *Rose v. Lundy*, 455 U.S. at 522. As the dissent observes, "[i]t is one thing to construe a pro se petitioner's pleadings liberally, and to require the district court to explain its reasons for dismissing a complaint. It is quite another thing to require the district court judge to act as petitioner's legal advisor." App. A43.

At least three other circuit courts of appeals have rejected the majority's approach in this case. Thus, the majority's decision conflicts with *Rose v. Lundy*, institutionalizes a stay and abeyance procedure of dubious merit, imposes new and onerous burdens on district courts in connection with the dismissal of mixed habeas petitions, and clashes with the holdings of other federal appellate courts.

1. This Court has repeatedly held that "because a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, . . . a district court must dismiss habeas petitions containing both unexhausted and



exhausted claims." *Rose v. Lundy*, 455 U.S. at 522; *id.* at 518-19 ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error"); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims"); *Castille v. Peoples*, 489 U.S. 346, 349 (1989) ("Respondent's habeas petition should have been dismissed if state remedies had not been exhausted as to any of the federal claims"); *Teague v. Lane*, 489 U.S. 288, 325 (1989) (Stevens, J., concurring) ("In *Rose v. Lundy*, . . . the Court announced that a habeas petition containing exhausted and unexhausted claims must be dismissed"); *Engle v. Isaac*, 456 U.S. 107, 124 n.25 (1982) ("If [an unexhausted] claim were present, *Rose v. Lundy*, . . . would mandate dismissal of the entire petition").

More recently, in *Duncan v. Walker*, 533 U.S. at 167, this Court reaffirmed that principle by concluding that "[t]he exhaustion requirement [set forth in the AEDPA] ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." *Id.* at 178-79. The *Duncan* majority also noted that "[t]olling the limitation period for a federal habeas petition that is dismissed without prejudice would . . . create more opportunities for delay and piecemeal litigation without advancing the goals of comity and federalism that the exhaustion requirement serves. We do not believe that Congress designed the statute in this manner." *Id.* at 180.

In this case, Ford failed to dismiss his unexhausted claims from the First Petitions, despite being given the opportunity to do so. As such, the majority's insistence that Ford's consent to the dismissals of the First Petitions was "uninformed" is beside the point; Ford was warned that the petitions would be

dismissed if he did not delete his unexhausted claims. When Ford ignored that warning, the district court did what it was supposed to do: it dismissed the mixed petitions in compliance with *Rose v. Lundy*. The majority's conclusion that the dismissals were "improper" is therefore inconsistent with controlling Supreme Court precedent.

2. Equally troubling is the majority's circumvention of the AEDPA's limitation period, through the establishment of a procedure whereby a mixed petition may be filed, unexhausted claims dismissed, and a stay of proceedings obtained for the purpose of exhausting the dismissed claims in state court. Thus, as long as a petitioner files one exhausted claim before the expiration of the statutory period, he may obtain a stay of the proceedings to exhaust any newly-presented claims, and later add those claims to the pending petition by way of amendment. If allowed to stand, the majority's holding would render the AEDPA's limitation period virtually irrelevant, and reduce district courts to "a jurisdictional parking lot." *Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir. 1995). As this Court stated in *Rose v. Lundy*, "strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition." 455 U.S. at 520. The majority's holding will encourage the very opposite.

Indeed, when federal courts assume jurisdiction over a case, they have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992); *In re Blodgett*, 502 U.S. 236, 239-40 (1992) (*per curiam*). This is especially true in habeas proceedings, where the finality of a state judgment of conviction is dependent upon the conclusion of federal review. Considerations of comity also compel the timely consideration of matters in *capital* habeas cases, because of their importance to the State, as well as the tendency of



petitioners in such cases to prolong the litigation unduly and thus delay the execution of judgment. *See In re Blodgett*, 502 U.S. at 239 ("The orders by the Ninth Circuit to vacate submission of the case until completion of the state collateral proceeding and then to hold the case in abeyance pending filing and resolution of the third federal habeas proceeding in the District Court raise the very concerns regarding delay that were part of the rationale for this Court's decision[] in *Rose v. Lundy*"); *but cf. Duncan v. Walker*, 533 U.S. at 182 (Souter, J., concurring) ("[N]othing bars a district court from retaining jurisdiction pending complete exhaustion of state remedies"); *see also id.* at 182-83 (Stevens, J., concurring) ("[I]n our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies").

3. The majority's holding in that regard conflicts with the decisions of at least two other circuit courts of appeals. In *Victor v. Hopkins*, 90 F.3d 276 (8th Cir. 1996), the Eighth Circuit held that district courts lack authority to hold mixed petitions in abeyance, even in capital cases. As the court stated:

> We conclude that any suggestion in our prior cases that a district court has broad discretion to hold in abeyance a habeas petition including both exhausted and unexhausted claims pending exhaustion of state remedies is contrary to the Supreme Court's explicit directions in *Rose v. Lundy*. . . . The correct view is represented by our line of cases . . . in which we have given recognition to the clear teaching of *Rose v. Lundy* regarding the treatment of mixed petitions. Accordingly, we hold that the District Court has no authority to hold Victor's mixed petition in abeyance or to maintain the stay of execution. The choices stated in *Rose v. Lundy* are the only options available to a habeas

petitioner.

*Id.* at 282; *see also Jackson v. Dormire*, 180 F.3d 919, 920 (8th Cir. 1999) (following *Victor*); *Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998) (same).

In *Sterling v. Scott*, 57 F.3d at 451, the Fifth Circuit upheld the district court's dismissal of a mixed habeas petition in a capital case:

> As referred to earlier, 28 U.S.C. § 2254(b) provides that an application for a writ of habeas corpus "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." . . . The district court must also dismiss a mixed petition, such as Sterling's petition, containing both exhausted and unexhausted claims. . . . Accordingly, the district court was correct in dismissing Sterling's amended federal petition for failing to exhaust his state remedies as required in § 2254, and the district court did not err in refusing to hold in abeyance a petition over which it simply and plainly had no jurisdiction. . . .

*Id.* at 454; *see also Alexander v. Johnson*, 163 F.3d 906, 908 (5th Cir. 1998) ("A habeas petition containing both exhausted and unexhausted claims is a 'mixed' petition which should be dismissed without prejudice"); *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998) ("A federal habeas petition should be dismissed if state remedies have not been exhausted as to all of the federal court claims"); *McGrew v. Texas Bd. Of Pardons & Paroles*, 47 F.3d 158, 161 (5th Cir. 1995) ("McGrew's allegations reflect that he has not exhausted his state remedies and, therefore, insofar as his complaint can be construed as seeking habeas relief, it must be dismissed for failure to exhaust").



4. Moreover, no court (other than *Ford*) has ever held that a district court must advise a habeas petitioner that his federal claims may be time-barred, absent any equitable tolling, if he chooses to dismiss a mixed petition and return to state court to exhaust his newly-presented claims. As the dissent points out, the majority's decision "fails to take account of the fact that the district judge will almost never be able to tell, solely from the face of the petition, that the statute of limitations has expired." App. A42. Indeed, the absence of adequate documentation in that regard may very well result in misadvisement. Other problems abound:

> Numerous factors can affect a petitioner's decision to delete unexhausted claims and proceed with an amended petition, rather than accept dismissal without prejudice so that unexhausted claims can be pursued in state court. For example, the meritoriousness of the unexhausted claims is an extremely important factor; so is the fact that the failure-to-exhaust might foreclose those claims forever. The availability of key witnesses is another factor. The statute of limitations is only one element in the equation, and a fact-intensive one at that. Leaving aside the question of the proper role of the court as a neutral arbiter, the district court simply is in no position to identify all of the considerations that pertain. I respectfully suggest that it is the office of the court to fairly and impartially decide the case before it, not to act as the petitioner's paralegal.

App. A43 (Silverman, J., dissenting).

The majority's holding imposes an unwarranted burden upon district courts, and blurs the distinction between impartial decision-making and advocacy. This Court has never required any warnings or advisements regarding the AEDPA's limitation period, nor has it ever held that their absence renders the

dismissal of a mixed petition erroneous, as the majority concludes. *See Duncan v. Walker*, 533 U.S. at 178-79; *Rose v. Lundy*, 455 U.S. at 522.

5. The majority's requirement that petitioners be advised of the AEDPA's limitation period is also inconsistent with the Second Circuit's holding in *Warren v. Garvin*, 219 F.3d 111 (2d Cir. 2000). There, the appellant argued that his second habeas petition should be treated as a motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, and regarded as a continuation of his first petition; the appellant maintained that such relief was warranted because he was not warned in the first proceeding that the AEDPA's limitation period would preclude him from refiling. *Id.* at 114. In rejecting that argument, the Second Circuit held:

> Warren contends that he is entitled to relief "because [he] was never informed of the effect of a dismissal on his ability to bring a subsequent petition." However, appellant knew of the 1-year limitations period for habeas petitions under the AEDPA, and his failure to timely refile (or to pursue his additional state claims) is merely garden variety neglect. Because "excusable neglect" is a ground for relief under Rule 60(b)(1), it cannot be considered under Rule 60(b)(6). Therefore, Warren's petition, even if treated as a motion under Rule 60(b), must be denied.

*Id.* at 114-15; *see also Zarvela v. Artuz*, 254 F.3d 374, 378, 380 (2d Cir. 2001) (citing *Warren*).[2/]

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2. The majority relies upon *Zarvela* in support of its holding requiring advisements regarding the statute of limitations. *See* App. A31. As the dissent notes, however,

> even that case does not hold that it is error to dismiss a mixed petition without prejudice unless the petitioner is informed about the statute of limitations. . . . *Zarvela* says that a district court faced with a mixed petition should advise a petitioner that his options are either to proceed with only the exhausted claims, or to return to state court. The most that *Zarvela* says about the statute of limitations is that it might be "useful" for the district court to alert a petitioner to the AEDPA statute of limitations. . . . This is a far cry from what the majority holds today.

App. A43-A44.



Resolution of this conflict between the circuits is vital to the proper and consistent application of this Court's precedent.

## II.

**The Ninth Circuit's interpretation of Federal Rule of Civil Procedure 15(c) is contrary to law, effectively nullifies the AEDPA's limitation period, and is inconsistent with decisions of other circuit courts of appeals.**

Certiorari should be granted, also, because the majority's interpretation of the "relation back doctrine" is contrary to Rule 15(c) of the Federal Rules of Civil Procedure, circumvents the AEDPA's one-year limitation period, and is inconsistent with decisions of at least six other circuit courts of appeals. It also rests upon the erroneous premise that, because the district court did not provide the advisements discussed above, the district court's dismissals of the mixed petitions were improper. *See Rose v. Lundy*, 455 U.S. at 522.

1. The Warden submits at the outset that there is a serious question of whether the relation back doctrine applies to habeas corpus proceedings. Rule 81(a)(2) of the Federal Rules of Civil Procedure provides that the Rules govern habeas corpus cases "to the extent that the practice in such proceedings is not set forth in statutes of the United States, [or] the Rules Governing Section 2254 Cases, . . . and has heretofore conformed to the practice in civil actions." Rule 11 of the Rules Governing Section 2254 Cases provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not

inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." *See also Harris v. Nelson*, 394 U.S. 286, 295 (1969) (the drafters' intent with respect to the 1938 creation of the Federal Rules of Civil Procedure "indicates nothing more than a general and nonspecific understanding that the rules would have very limited application to habeas corpus proceedings").

Rule 15(c) applies only to proceedings that are governed by a statute of limitations. Indeed, the Advisory Committee Notes to Rule 15(c) state in pertinent part that "[r]elation back is intimately connected with the policy of the statute of limitations." *See also Order of R.R. Telegraphers v. R.R. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944) (rationale of statute of limitations in civil actions is to prevent the bringing of stale claims); *compare Teague v. Lane*, 489 U.S. at 306 (O'Connor, J.) (purpose of habeas corpus jurisprudence is to leave "'concluded litigation in a state of repose'"). At the time of its enactment, Rule 15(c) did not govern the filing of habeas petitions, because there was no need for newly-presented claims to relate back to a previous filing. *See Harris v. Nelson*, 394 U.S. at 295-96. Until the AEDPA, there was no statutory limitation period which applied to habeas corpus proceedings. Thus, to apply Rule 15(c) to habeas corpus cases would be "inconsistent" with "the practice in such proceedings." *See* Fed. R. Civ. P. 81(a)(2); Rule 11, foll. 28 U.S.C. § 2254; *see also Harris v. Nelson*, 394 U.S. at 294 ("Habeas corpus practice in the federal courts has conformed with civil practice only in a general sense").

2. Even assuming the relation back doctrine applies to habeas corpus cases, the majority has interpreted the doctrine in such a way as to nullify the AEDPA's limitation period. Rule 15(c) provides that an amendment of a pleading relates back to the date of the original pleading when "relation back is permitted by the law that provides the statute of limitations applicable to the action, or [¶] . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction,



or occurrence set forth or attempted to be set forth in the original pleading . . . ." Building upon the errors discussed previously, the majority holds that because the dismissals of the First Petitions were "improper," the claims that were included in the First Petitions and then reasserted in the Second Petitions were not time-barred under the AEDPA, but "relate[d] back to and preserve[d] the filing date of the initial petitions." App. A15.

No court (again, other than *Ford*) has ever held that an otherwise untimely habeas petition relates back to a prior habeas petition in a proceeding that was dismissed and is no longer pending. Indeed, in *Green v. White*, 223 F.3d 1001 (9th Cir. 2000), a different Ninth Circuit panel held that "[a] second habeas petition does not relate back to a first habeas petition when the first habeas petition was dismissed for failure to exhaust state remedies." *Id.* at 1003. As the dissent in this case observes:

> Ford never appealed the dismissal of [the First Petitions]. (He still hasn't.) What he did instead was go back to state court and exhaust his remaining claims. He eventually returned to federal court and filed the new petitions that are the subject of this appeal. By that time, the statute of limitations had run and the petitions were dismissed as time-barred.
>
> This was precisely the situation we upheld in *Green* . . . . Green's first, timely petition was dismissed without prejudice "apparently because Green had not exhausted his state remedies as to some claims." . . . After exhausting his state remedies, Green returned to federal court. Like Ford, his claims had become time-barred.

App. A41 (citing *Green v. White*, 223 F.3d at 1002); *see also id.* at A41 ("Because *Green* is identical to the present case in all material respects, the majority is forced to concoct a way around

it").[3/]

The potential impact of the majority's holding is enormous: habeas petitions filed long after the expiration of the AEDPA's limitation period would be rendered timely through relation back to a prior petition in a different proceeding, *even though that proceeding had been dismissed and was no longer pending*. The Fifth Circuit recently rejected such an approach in a similar situation:

> [I]f § 2244(d) were interpreted as Petitioner argues, the result would be impractical. A habeas petitioner could file a non-exhausted application in federal court within the limitations period and suffer a dismissal without prejudice. He could then wait decades to exhaust his state court remedies and could also wait decades after exhausting his state remedies before returning to federal court to "continue" his federal remedy, without running afoul of the statute of limitations.
>
> . . . Construing an application filed after a previous application is dismissed without prejudice as

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3. The dissent also criticizes the majority's citation of supporting authority that was issued after the original decision in this case:

> The majority's reliance on *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003), is simply bizarre. The amended *Kelly* opinion was filed after the original opinion in this case (*Ford*) and relies on the original *Ford* opinion for support. *Id.* at 1070-71. Now, in *its* amended opinion, the majority in *this* case (*Ford*), relies on *Kelly*, which in turn relies on *Ford*. The wacky circularity of all of this does not change the fact that it was the *Ford* majority in *this* case that originally cooked up the rule on which the *Kelly* court relied, and with which I respectfully disagree for the reasons I've given.

App. A44 (emphasis in original).



> a continuation of the first application for all purposes would eviscerate the AEDPA limitations period and thwart one of AEDPA's principal purposes. . . .

*Graham v. Johnson*, 168 F.3d 762, 780 (5th Cir. 1999) (quoting in part the district court's decision dismissing a second habeas petition as untimely).

3. At least six other circuit courts of appeals have expressly declined to apply the relation back doctrine to a former habeas proceeding. *See Neverson v. Bissonnette*, 261 F.3d 120, 126 (1st Cir. 2001) (relation back doctrine did not apply where the dismissal of initial habeas proceeding left "nothing to which Petition No. 2 could relate back"); *see also Newell v. Hanks*, 283 F.3d 827, 834 (7th Cir. 2002); *Marsh v. Soares*, 223 F.3d 1217, 1219-20 (10th Cir. 2000); *Warren v. Garvin*, 219 F.3d at 113; *Nyland v. Moore*, 216 F.3d 1264, 1266 (11th Cir. 2000); *Jones v. Morton*, 195 F.3d 153, 160-61 (3d Cir. 1999); *cf. Hunt v. Hopkins*, 266 F.3d 934, 936-37 (8th Cir. 2001) (amended petition related back to prior petition in *same* proceeding because *action* had not been dismissed).

Given the Ninth Circuit's unwarranted extension of the relation back doctrine and the conflict between the circuits, guidance from this Court is now necessary.

## CONCLUSION

The petition for writ of certiorari should be granted.

Dated: August 8, 2003

Respectfully submitted,

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APPENDIX A

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| **RICHARD HERMAN FORD,** Petitioner-Appellant, **v.** **S. HUBBARD, Warden; DANIEL E. LUNGREN, Attorney General,** Respondents-Appellees. | No. 98-56455 D.C. No. CV-98-02557-RAP-SH |
| **RICHARD HERMAN FORD,** Petitioner-Appellant, **v.** **S. HUBBARD, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,** Respondents-Appellees. | No. 98-56587 D.C. No. CV-98-02556-RAP (SH) |
| **RICHARD HERMAN FORD,** Petitioner, **v.** **UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,** Respondent, S. HUBBARD, Warden, Real Party in Interest. | No. 98-80477 D.C. No. CV-97-03385-RAP/SH |

**RICHARD HERMAN FORD,**
Petitioner,

**v.**

**S. HUBBARD, Warden,**
Respondent.

No. 98-80582

D.C. No.
CV-97-03385-
RAP/SH

**RICHARD HERMAN FORD,**
Petitioner,

**v.**

**UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,**
Respondent,

S. HUBBARD, Warden,
Real Party in Interest.

No. 98-80603
D.C. No.
CV-97-03385-
RAP/SH

ORDER
AMENDING
OPINION, AND
DENYING
REHEARING
AND
REHEARING
EN
BANC AND
AMENDED
OPINION

Appeal from the United States District Court
for the Central District of California
Richard A. Paez, District Judge, Presiding

Argued and Submitted November 6, 2001
Submission vacated June 10, 2002
Re-Submitted July 24, 2002
Pasadena, California

Filed September 6, 2002
Amended May 15, 2003



Before: Harry Pregerson, Stephen Reinhardt and
Barry G. Silverman, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge Silverman

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## SUMMARY

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### Criminal Law and Procedure/Habeas Corpus

The court of appeals affirmed a judgment of the district court in part, vacated in part, and remanded. The court held that a district court, when informing a habeas petitioner of his options with respect to a petition containing both exhausted and unexhausted state claims, should alert the petitioner to the one-year limitations period of the Antiterrorism and Effective Death Penalty Act (AEDPA) and to the fact that a portion of that period has already elapsed.

Appellant Richard Ford was convicted in California state court, in two separate prosecutions, of, among other things, first-degree murder, conspiring to commit murder, and attempted murder. Ford was sentenced to various terms of custody in the two cases, including life without the possibility of parole. On appeal, the California Court of Appeal affirmed his convictions, and his petitions for review of the California Supreme Court were denied. Ford then petitioned for writs of certiorari in the United States Supreme Court, which were also denied. Several days prior to the expiration of AEDPA's limitations period, Ford filed *pro se* federal habeas corpus petitions with motions to stay the petitions containing exhausted grounds while he exhausted the then-unexhausted state claims. The magistrate judge issued an order giving him the choice of

either (1) dismissing the petition without prejudice and re-filing after exhaustion of the unexhausted claims or (2) dismissing the unexhausted claims and proceeding with only the exhausted claims. Ford opted to have the petition dismissed in order to exhaust his unexhausted claims. The magistrate judge issued a report recommending that the district court dismiss the habeas petitions without prejudice because they were partially exhausted petitions. However, the district court did not inform Ford that the AEDPA one-year statute of limitations had expired during the pendency of his federal habeas petitions so that, if he chose to dismiss his federal petitions and returned to state court to exhaust all of his claims, he would be time-barred when he attempted to re-file his federal claims. The district court adopted the magistrate's report and dismissed Ford's petitions, purportedly without prejudice.

Ford filed state habeas corpus petitions in the California Supreme Court, which were summarily denied. Shortly thereafter, Ford returned to federal district court and filed second *pro se* federal habeas corpus petitions. The magistrate issued a report recommending that Ford's petitions be dismissed with prejudice as untimely under AEDPA. The district judge adopted the magistrate's report and dismissed the petitions as time-barred.

Ford appealed, and the two cases were consolidated.

**[1]** The rights of *pro se* litigants require careful protection when highly technical requirements are involved, especially when enforcing those requirements might result in the loss of the opportunity to prosecute or defend a lawsuit on the merits. Before dismissing a *pro se* complaint, the district court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively. **[2]** Given that Ford was proceeding *pro se*, the district court was obligated to inform him of his options with respect to his mixed habeas petitions: to advise him that it would have the power to consider his stay motions only if he opted to proceed with his exhausted claims



and dismiss the unexhausted claims. **[3]** The district court's failure to explain the procedural deficiency that precluded it from granting Ford's stay motions deprived Ford of a fair and informed opportunity to have his stay motions heard, to exhaust his unexhausted claims, and ultimately to have his claims considered on the merits. Thus, it had to be held that the district court's action constituted prejudicial error. **[4]** The district court further erred when it failed to inform Ford that, on the face of the complaints, he would be time-barred under AEDPA on all of his claims if he either failed to amend his petitions or chose the option of dismissing them and returning to state court to exhaust the unexhausted claims. Although Ford timely filed both of his initial federal habeas petitions, he was only timely by a few days. Because AEDPA's one-year limitations period is not statutorily tolled during the pendency of a federal habeas petition, the statute of limitations was still running during the four-month period before the magistrate judge issued his findings and recommendations. Thus, when the district court gave Ford the option to dismiss his petitions and return to state court to exhaust his then-unexhausted claims, his time for filing new federal petitions had already expired by more than four months. **[5]** As a result, the district court misled Ford by informing him that if he opted to dismiss the petitions to return to state court to exhaust his claims, the dismissal would be without prejudice. A district court, when informing a habeas petitioner of his options with respect to a mixed petition, should alert the petitioner to the one-year limitations period of AEDPA and to the fact that a portion of that period has already elapsed. The district court's failure to alert Ford to the current status of his claim under the AEDPA one-year statute of limitations clearly deprived him of the opportunity to make a meaningful choice between the two options, and inevitably resulted in the subsequent dismissal of all of Ford's claims as time-barred. As such, the district court's failure fairly or fully to explain the consequences of the options it presented to Ford constituted the prejudicial error. **[6]** Had

the district court fairly and properly explained Ford's options to him, it would have been unlikely that his second petitions would have been dismissed as time-barred. **[7]** In order to ensure that Ford's rights were not unduly prejudiced as a result of the district court's errors, it had to be held that a *pro se* habeas petitioner who files a mixed petition that is improperly dismissed by the district court, and who then, following the district court's erroneous legal statements, returns to state court to exhaust his unexhausted claims and subsequently re-files a second petition without unreasonable delay, may employ the amendment procedures of Federal Rule of Civil Procedure 15 to have the second petition relate back to and preserve the filing date of the improperly dismissed initial petition. **[8]** Thus, the order dismissing the claims that were originally raised in Ford's initial federal habeas petitions and then re-filed in his second petitions as untimely had to be vacated and remanded to the district court for consideration on the merits.

Judge Silverman dissented, writing that requiring the district court to incorporate a warning about the statute of limitations when informing a habeas petitioner of his options with respect to a mixed petition is tantamount to requiring the district judge to improperly act as the petitioner's legal advisor.

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## COUNSEL

Lisa M. Bassis, Los Angeles, California, for the petitioner-appellant.

Bill Lockyer, Attorney General for the State of California; David P. Druliner, Chief Assistant Attorney General; Carol Wendelin Pollack, Senior Assistant Attorney General; Steven D. Matthews, Supervising Deputy Attorney General; and Paul M. Roadarmel, Jr., Deputy Attorney General, Los Angeles, California, for the respondents-appellees.



## ORDER

The majority opinion filed September 6, 2002, slip op. 13341, and appearing at 305 F.3d 875 (9th Cir. 2002), is hereby amended as follows:

1. slip op. at 13347, line 18: after "*See*" and before the citation to *James v. Pliler*, insert "*Kelly v. Small*, 315 F.3d 1063, 1070-71 (9th Cir. 2003);"

2. slip op. at 13347, line 18: after the above new citation to *Kelly v. Small*, insert the following footnote: "As our dissenting colleague is well aware, in the course of confronting similar issues, the *Kelly* panel and this panel arrived at the same conclusions at approximately the same time, and filed their respective opinions within days of each other. Because we are part of a larger collegial body, and because it is our general practice to try to make our opinions as consistent as possible, both panels decided to make several harmonizing modifications to their originally filed opinions. Each panel amended its opinion to refer to the other, in part to make the coordination of our dispositions clear. We are, accordingly, puzzled that the dissent should find our action 'bizarre.' "

3. slip op. at 13347, line 28: after "(unless he could show that he was entitled to equitable tolling)," insert "*See Valerio v. Crawford*, 306 F.3d 742, 770-71 (9th Cir. 2002) (en banc), *cert. denied*, ___ S. Ct. ___ (2003)."

4. slip op. at 13348, line 23: after the citation to *Anthony v. Cambra*, insert ", *cert. denied*, 533 U.S. 941 (2001)."

5. slip op. at 13348, line 26: after the citation to *Zarvela v. Artuz*, insert ", *cert. denied*, 534 U.S. 1015."

6. slip op. at 13350, lines 10-11: replace " Ford did not do so. As a result, on September 10, 1997" with "On July 28, 1997, Ford instead opted to have the petition dismissed in order to exhaust his unexhausted claims. As a result, on August 5, 1997"

7. slip op. at 13353, n.4, line 5: replace "*Miranda & Wong Sun*" with "*Miranda and Wong Sun*"

8. slip op. at 13355, lines 14-15: replace "*Carey v. Saffold*, 122 S. Ct. 2134 (June 17, 2002) (No. 01-301)." with "*Carey v. Saffold*, 536 U.S. 214 (2002)."

9. slip op. at 13356, line 10: after the citation to *James v. Giles* and before "*see also Freeman v. Page*," insert "As we recently said in *Kelly v. Small*, 'The exercise of discretion to stay the federal proceeding is particularly appropriate when an outright dismissal will render it unlikely or impossible for the petitioner to return to federal court within the one-year limitation period imposed by [AEDPA].' *Kelly*, 315 F.3d at 1070;"

10. slip op. at 13356, line 13: after the citation to *Freeman v. Page*, insert ", *cert. denied*, 531 U.S. 946"

11. slip op. at 13357, n.6, lines 8-9: replace "*Wyatt v. Terhune*, 280 F.3d 1238, 1245-46 (9th Cir. 2001)" with "*Wyatt v. Terhune*, 315 F.3d 1108, 1118-19 (9th Cir. 2003)"

12. slip op. at 13358, line 20: after "(quoting *Freeman*, 208 F.3d at 577))" and before "Thus, the district court, by failing to inform. . .", insert "; *see also Kelly*, 315 F.3d at 1070 (finding that the decision 'to stay the federal proceeding is particularly appropriate when an outright dismissal will render it unlikely or impossible for the



petitioner to return to federal court within the one-year limitation period imposed by [AEDPA].')."

13. slip op. at 13358, line 36: after "a denial of the request would likely constitute error," replace "*See Zarvela*" with "As the First Circuit recently recognized, '[T]here is a growing consensus that a stay is required when dismissal could jeopardize the petitioner's ability to obtain federal review.' *Nowaczyk v. Warden, N.H. State Prison*, 299 F.3d 69, 79 (1st Cir. 2002); *see also Zarvela*"

14. slip op. at 13359, lines 2-3: replace "*see also James*, 269 F.3d at 1126" with "*James*, 269 F.3d at 1126"

15. slip op. at 13360, lines 30-31: replace "What the district court should have told Ford," with "Other circuits have also noted the deceptive nature of a dismissal without prejudice when the claims dismissed are time-barred; in *Rodriguez v. Bennett*, 303 F.3d 435 (2d Cir. 2002), for example, the Second Circuit explained that for a petitioner dismissed 'without prejudice' after a year in federal habeas proceedings, 'the 'without prejudice' provision was an illusion; petitioner could never succeed in timely refiling the petition because he would already be time-barred.' *Rodriguez*, 303 F.3d at 439. [¶] We have recognized a district court's obligation to avoid misleading petitioners. In *Valerio v. Crawford*, 306 F.3d 742 (2002), *cert. denied*, ___ S. Ct. ___ (2003), the en banc court instructed the district court to inform a petitioner when claims to be dismissed 'without prejudice' would actually be time-barred. *See Valerio*, 306 F.3d at 770-71. This simple step helps avoid the unnecessary forfeiture of petitioners' constitutional rights. Here, what the district court should have told Ford."

16. slip op. at 13361, line 7: after "choice between the two

options. *See* ," and before the citation to *James*, insert "*Valerio*, 306 F.3d at 770-71 (finding that the district court must inform the petitioner of a potential time-bar before the petitioner chooses whether to amend his mixed petition, in order to make that choice meaningful);"

17. slip op. at 13361, n.7, line 14: after "absent equitable toiling," and before "To do otherwise," insert "*See Valerio*, 306 F.3d at 770-71."

18. slip op. at 13363, line 30: after the citation to *Van Tran v. Lindsey*, insert ", *cert. denied*, 531 U.S. 944, *overruled on other grounds by Locker v. Andrade*, 123 S. Ct. 1166, ___ (2003)."

19. slip op. at 13364, n.10: replace n.10 with "*Compare Anthony*, 236 F.3d at 574 (holding that the district court's outright dismissal of Anthony's mixed petition without having adequately informed him of his options was 'improper') *and* discussion *supra* Sections II.A. & II.B. (explaining why Ford's initial habeas petitions were improperly dismissed) *with Anthony*, 236 F.3d at 574 n.1 (stating that the dismissal of the mixed habeas petitions in *Green, Van Tran*, and *Henry* were 'proper')."

20. slip op. at 13364, n.11, lines 1-3: replace "*See Jorss*, 266 F.3d at 957 n.1 (emphasizing that the petitioner in *Green* 'accepted' the proper dismissal of his mixed petition). Similarly, the petitioners in *Van Tran* and *Henry*" with "The petitioners in *Green, Van Tran* and *Henry*"

21. slip op. at 13366-67, n.14, lines 11-14: replace "; *Jorss v. Gomez*, 266 F.3d 955, 957-58 (9th Cir. 2001) (holding that the district court's erroneous dismissal of Jorss's timely-filed habeas petition as unexhausted constitutes an extraordinary circumstance that equitably tolled AEDPA's



statute of limitations)." with ". The Fifth Circuit recently found similar circumstances appropriate for equitable tolling in the context of a prisoner's § 1983 suit dismissed ostensibly without prejudice for failure to exhaust administrative remedies. In *Clifford v. Gibbs*, 298 F.3d 328 (5th Cir. 2002), the court recognized the impropriety of a dismissal without prejudice that actually left claims 'forever precluded.' *Id.* at 333. It held that claims should be equitably tolled when the 'district court's dismissal . . . without prejudice actually operates as a dismissal with prejudice because [the petitioner] is barred from returning to federal court after exhausting his remedies because limitations has already run.' *Id.* Ford faced the same constraints."

22. slip op. at 13369, line 3: after the citation to *Miranda v. Castro*, insert ", *cert. denied*, 123 S. Ct. 496"

23. slip op. at 13369, n.18, line 4: after the citation to *Frye v. Hickman*, insert ", *cert. denied*, 535 U.S. 1055 (2002)"

24. slip op. at 13369, n.18, line 6: after the citation to *Kreutzer v. Bowersox*, insert ", *cert. denied*, 534 U.S. 863 (2001)"

25. slip op. at 13369, n.18, line 9: after the citation to *United States v. Saro*, insert ", *cert. denied*, 534 U.S. 1149 (2002)"

26. slip op. at 13369, line 7: replace "*Calderon v. United States District Court (Beeler)*" with "*Calderon v. U.S. Dist. Court (Beeler)*" and after the *Beeler* parenthetical, at line 11, insert ", *overruled on other grounds by Calderon v. U.S. Dist. Court (Kelly)*, 163 F.3d 530, 540-41 (9th Cir. 1998) (en banc)."

27. slip op. at 13369, n.19, line 3: after the citation to *Fahy v.*

*Horn*, insert ", *cert. denied*, 534 U.S. 944"

28. slip op. at 13374, lines 17-18: replace "nor does any other case" with "nor does any other case involving a routine mixed petition."

29. slip op. at 13375, line 20: after "This is a far cry from what the majority holds today," insert the following two new paragraphs:

> The majority's reliance on *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002) (en banc) is likewise misplaced. *Valerio* involved highly unusual procedural circumstances of nearly Talmudic complexity, circumstances too convoluted to recount here. But in a nutshell, this court itself created a mixed petition for the petitioner by reinstating, on appeal, new unexhausted claims that had been dismissed by the district court for abuse of the writ. In a portion of the opinion entitled, "Procedure on Remand," the court sought to bring some order to the chaos by giving the district court detailed instructions on how to proceed from that point on, including the direction to inform Valerio of a possible time-bar in the event that the district court were to decline to follow the stay-and-abeyance procedure on remand. In no way, shape or form can *Valerio* be read to require *Miranda*-like warnings about the statute of limitations in the garden variety mixed-petition case.
>
> The majority's reliance on *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003), is simply bizarre. The amended *Kelly* opinion was filed after the original opinion in this case (*Ford*) and relies on the original *Ford* opinion for support. Id. at 1070-71. Now, in *its* amended opinion, the majority in *this case* (*Ford*) relies on *Kelly*, which in turn relies on *Ford*. The wacky circularity of all of this does not change the fact that it was the *Ford* majority in *this* case that originally cooked up the rule on which the *Kelly* court relied, and with which I respectfully disagree for the reasons I've given.



30. slip op. at 13376, line 10: replace "Ford did not raise this equitable tolling issue in" with "Ford did not raise equitable tolling in"

31. slip op. at 13376, lines 11-12: replace "this appeal — not even" with "this appeal, not even"

With these amendments, the panel has voted to deny the petition for panel rehearing and the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. A judge of the court requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. Fed. R. App. P. 35.

The petition for rehearing and the suggestion for rehearing en banc are DENIED.

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**OPINION**

REINHARDT, Circuit Judge:

Richard Herman Ford, a California prisoner, appeals the district court's dismissal of his two habeas corpus petitions as time-barred under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d). Both federal habeas petitions were initially timely filed in the district court by Ford proceeding *pro se*; however, both were "mixed" petitions containing exhausted as well as unexhausted claims.

Along with the mixed petitions, Ford filed motions to stay each of them while he exhausted the then-unexhausted claims in state court. The district court gave him the option with respect to both petitions of either dismissing the unexhausted claims and proceeding only with the exhausted claims or dismissing the petitions without prejudice and re-filing after exhaustion of the unexhausted claims. The district court did not, however, inform Ford that it would not have the power to consider his motions to stay the petitions unless he opted to amend them and dismiss the then-unexhausted claims. *See Kelly v. Small*, 315 F.3d 1063, 1070-71 (9th Cir. 2003);[1/] *James v. Pliler*, 269 F.3d 1124, 1126-27 (9th Cir. 2001); *Calderon v. District Court (Taylor)*, 134 F.3d 981, 989 (9th Cir. 1998). Although the magistrate's orders stated and the district court's orders reiterated that the dismissals were *without prejudice*, the district court also did not inform Ford that the AEDPA one-year statute of limitations had expired during the pendency of his federal habeas petitions so that, if he chose to dismiss his federal petitions and returned to state court to exhaust all of his claims, he would be time-barred when he attempted to re-file his federal claims (unless he could show that he was entitled to equitable tolling) *See Valerio v. Crawford*, 306 F.3d 742, 770-71 (9th Cir. 2002) (en banc), *cert.* denied, ___ S. Ct. ___ (2003).

Ford, still proceeding *pro se*, opted to have both petitions dismissed without prejudice and returned to state court to exhaust his remaining claims. When he re-filed his claims in

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1. As our dissenting colleague is well aware, in the course of confronting similar issues, the *Kelly* panel and this panel arrived at the same conclusions at approximately the same time, and filed their respective opinions within days of each other. Because we are part of a larger collegial body, and because it is our general practice to try to make our opinions as consistent as possible, both panels decided to make several harmonizing modifications to their originally filed opinions. Each panel amended its opinion to refer to the other, in part to make the coordination of our dispositions clear. We are, accordingly, puzzled that the dissent should find our action 'bizarre.'



federal court after exhausting all of them, however, the district court dismissed his petitions as time-barred.

We conclude that the district court erred by failing to inform Ford (1) that it could consider his stay motions only if he opted to amend the petitions and dismiss the then unexhausted claims, and (2) that his federal claims would be time-barred, absent cause for equitable tolling, upon his return to federal court if he opted to dismiss the petitions "without prejudice" and return to state court to exhaust all of his claims. Because Ford's decision to have his timely-filed federal habeas petitions dismissed without prejudice was an uninformed one, we conclude that the district court's dismissal of his initial federal habeas petitions without prejudice constituted prejudicial error.

We next address the district court's dismissal of Ford's second federal habeas petitions as time-barred, hold that the claims that were included in his initial petitions and then reasserted in his second petitions are not time-barred under AEDPA, and remand them for consideration on the merits. Specifically, we apply Federal Rule of Civil Procedure 15(c) to Ford's second petitions and hold that the second petitions relate back to and preserve the filing date of the initial petitions. *See Anthony v. Cambra*, 236 F.3d 568, 575-77 (9th Cir. 2000), *cert. denied*, 533 U.S. 941 (2001). In so doing, we follow the approach taken by the Second Circuit in *Zarvela v. Artuz*, 254 F.3d 374, 382-83 (2d Cir. 2001), *cert. denied*, 534 U.S. 1015.

With respect to the claims that were raised for the first time in Ford's second habeas petitions, we affirm the district court's dismissal of the two claims in the "Loguercio" case (No. CV 98-2557), but we vacate the dismissal of the five claims in the "Weed" case (No. CV 98-2556). We remand the additional Weed claims for an evidentiary hearing on equitable tolling. *See Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc).

## I. PROCEDURAL BACKGROUND

### A. The Loguercio Case

On January 6, 1988, Richard Ford and Robert Anthony Von Villas, both former Los Angeles police officers, were convicted of conspiring to murder John Loguercio and attempting to murder his wife in violation of California Penal Code §§ 182, 187, 664, and robbery, conspiracy to commit robbery, and assault with a firearm in violation of California Penal Code §§ 182, 211, 245(a)(2). Ford was also convicted of attempting to administer an intoxicating agent in violation of California Penal Code §§ 222, 664. On March 11, 1988, he was sentenced to thirty-six years to life in prison.

Ford appealed the judgment and, on October 9, 1992, the California Court of Appeal affirmed his conviction. He appealed to the California Supreme Court, but his petition for review was denied on January 14, 1993. He then filed a petition for a writ of certiorari in the United States Supreme Court, which was denied on June 14, 1993. *See Ford v. California*, 508 U.S. 975 (1993).

On April 19, 1997, Ford signed and delivered to the prison authorities a *pro se* federal habeas corpus petition. His petition was forwarded to the clerk and filed in the United States District Court for the Central District of California on May 5, 1997.[2/] Ford also filed a motion to stay the federal habeas

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2. In his initial federal petition, Ford claimed that he was entitled to relief on the following grounds: (1) trial court violated his confrontation clause rights when it quashed subpoena duces tecum issued by defense concerning freelance writer who had 10 hours of a taped interview with the chief prosecution witness about the case; (2) the defense was unconstitutionally burdened when the court excluded evidence of the writer's pecuniary interest as irrelevant; (3) trial court erred in not allowing evidence of prosecutorial misconduct on the basis of instructions to the police to cease interviewing witnesses; (4) trial court erred in not allowing the defense to present extrinsic evidence of third-party culpability; (5) trial court's refusal to allow evidence about the petitioner's wife's rape, tape recordings of the prosecution's key witness, and references to the co-defendant hampered the defense; (6) failure to allow evidence of specific acts of misconduct in order to impeach prosecution's prime witness was error; (7) jury misconduct resulting from the jury foreman producing his own "spread sheet," which was then used by the entire jury; (8) failure to suppress a general warrant lacking in specificity and particularity violated petitioner's rights under the Fourth & Fourteenth Amendments; (9) due process rights were denied by State's failure to preserve potentially favorable evidence; (10) trial court prejudicially refused to instruct the jury about the inferences to be drawn against People for loss of evidence seized pursuant to warrant; and (11) trial court erroneously refused to instruct that the jury that it had to be unanimous on each overt act of each conspiracy.



corpus petition containing exhausted grounds while he exhausted the then-unexhausted state claims. The magistrate judge, realizing that some of Ford's claims had not been exhausted, issued an order giving him the choice of either (1) dismissing the petition without prejudice and re-filing after exhaustion of the unexhausted claims or (2) dismissing the unexhausted claims and proceeding with only the exhausted claims. Under the magistrate's order, if Ford wanted to waive the unexhausted claims and proceed only on the exhausted claims, he was to so notify the court. On July 28, 1997, Ford instead opted to have the petition dismissed in order to exhaust his unexhausted claims. As a result, on August 5, 1997 the magistrate judge issued his report recommending that the district court dismiss the habeas petition without prejudice because it was a partially-exhausted petition under *Rose v. Lundy*, 455 U.S. 509, 522 (1982). In his report and recommendations, the magistrate judge stated that the court did not have the discretion to grant Ford's motion for a stay because the court could not stay a mixed petition. On September 11, 1997, the district court adopted the magistrate's report and dismissed Ford's petition, purportedly without prejudice.

On September 29, 1997, Ford filed a state habeas corpus petition in the California Supreme Court. His petition was

summarily denied on March 25, 1998. Ford then returned to federal court on April 7, 1998 and filed a second *pro se* federal habeas corpus petition in the district court.[3] On April 29, 1998, the state filed an answer and, on June 5, 1998, the state filed a motion to dismiss Ford's petition as untimely under AEDPA's one-year statute of limitations. On June 17, 1998, Ford filed an opposition to the motion. On June 26, 1998, the magistrate issued a report recommending that Ford's petition be dismissed with prejudice as untimely. Ford filed an objection to the report on July 16, 1998. On July 22, 1998, the district judge adopted the magistrate's report and dismissed the petition as time-barred.

On August 17, 1998, Ford filed a notice of appeal and moved for a certificate of appealability ("COA"). The district court denied his motion for a COA on August 25, 1998. Ford then sought a COA from this court and his motion was consolidated with a similar motion that he filed in the Weed case. *See infra* Section I.C.

**B. The Weed Case**

The procedural history of the Weed case is virtually identical. On October 11, 1988, Ford and Von Villas were convicted of first-degree murder and conspiracy to commit murder for killing Thomas Weed in violation of California Penal Code §§ 182, 187, 190.2(a)(1). After the jury deadlocked during the penalty phase of Ford's trial, the trial court sentenced him to life without the possibility of parole on the murder count and stayed a concurrent term of twenty-five years to life on the conspiracy count.

Ford appealed the judgment and, on November 16, 1992, the California Court of Appeal affirmed his convictions. On

3. In his second petition, Ford re-alleged all of the grounds from his initial petition and also alleged that he was entitled to relief because his trial and appellate counsel were constitutionally ineffective.



February 11, 1993, the California Supreme Court issued a summary denial of Ford's direct appeal. Ford filed a petition for a writ of certiorari in the United States Supreme Court, which was denied on October 4, 1993. *See Ford v. California*, 510 U.S. 838 (1993).

On April 19, 1997, Ford signed and delivered to the prison authorities a *pro se* federal habeas corpus petition. His petition was forwarded to the clerk and filed in the United States District Court for the Central District of California on May 5, 1997.[4] Ford also filed a motion to stay the federal habeas corpus petition containing exhausted grounds while he exhausted the then-unexhausted state claims. As in the Loguercio case, the magistrate judge gave Ford the choice of either (1) dismissing the petition without prejudice and re-filing after exhaustion of the unexhausted claims or (2) dismissing the unexhausted claims and proceeding with only the exhausted claims. The magistrate issued an order, however, in which he stated that the district court did not have the discretion to stay a mixed petition so that the motion to stay the proceedings was denied. Additionally, the order stated that Ford was to notify the

4. In his initial federal petition, Ford claimed that he was entitled to relief on the following grounds: (1) a tape recording was entered into evidence in violation of his constitutionally cognizable expectation of privacy; (2) there was Fourth Amendment violation because the seizure of evidence exceeded the scope of the warrant; (3) a warrant for a tape recording was obtained in violation of Title III, the Omnibus Crime Act, 18 U.S.C. § 2510 et seq.; (4) a tape recording was used in violation of his protected marital privilege and invaded his constitutional right to confidential communication;(5) Fourteenth Amendment violation resulting from a subsequent judge's action in changing the original judge's ruling on a PC § 995 motion; (6) due process violation resulting from an inaccurate ruling regarding "overt acts" among conspirators; (7) trial court's refusal to give the jury an instruction regarding the need for unanimous agreement on each specific overt act; (8) confrontation clause violation resulting from court's refusal to allow Ford to impeach the prosecution's witnesses about prior convictions and biases; (9) violation of the right to a fair trial resulting from admission of prejudicially misleading photographs; (10) misleading jury instruction on motive; and (11) ambiguous instruction on admissions.

court within approximately two and one-half weeks if he wanted to waive the unexhausted claims and proceed only on the exhausted claims. Ford did not so notify the court. As a result, on September 9, 1997, the magistrate judge issued his report recommending that the district court dismiss his habeas petition without prejudice because it was a partially exhausted petition under *Rose*, 455 U.S. at 522. On October 14, 1997, the district court adopted the magistrate's report and dismissed Ford's petition, purportedly without prejudice.

On October 24, 1997, Ford filed a state habeas corpus petition in the California Supreme Court. The petition was summarily denied on March 25, 1998. Ford then returned to federal court and, on April 7, 1998, he filed a second *pro se* federal habeas corpus petition in the district court.[5] The state filed an answer to the petition on April 29, 1998 and then, on May 11, 1998. filed a motion to dismiss alleging that the

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5. In his second petition, Ford re-alleged all of the grounds from his initial petition and also alleged the following new grounds: (1) prosecution erroneously used testimony obtained from a drugged alleged coconspirator; (2) the use of police agents to inculpate him by false testimony violated *Miranda* and *Wong Sun* and the Fourth, Fifth, Sixth, and Fourteenth Amendments; (3) prosecution misstated evidence and other case factors to cause the indictment and selective prosecution of Ford, which violated the truth-in-evidence doctrine and violated his constitutional rights; (4) judicial misfeasance, abuse of discretion, and nonfeasance misdirected the jury and violated Ford's rights to an impartial jury, due process, and equal protection; and (5) ineffective assistance of counsel.

Respondent also contends that Ford's assertion in his second petition that two exceptions to the Fourth Amendment warrant requirement do not apply to his case are new claims. The contentions, however, do not constitute claims, but are simply arguments in support of the claim of a Fourth Amendment violation — a claim that he asserted in his initial petition. Additionally, respondent contends that Ford's claim that "an investigative authority that has no coercion for, or authority over, jail security receives no deference for intrusions on inmate/citizen privacy" is newly-raised. Here, too, we hold that Ford has not asserted a claim but rather advanced an argument in support of the claims that he previously raised in grounds one and four of his initial petition, *see supra* note 3.



petition was untimely under AEDPA's one-year statute of limitations. Ford filed an opposition to the motion to dismiss on May 27, 1998 and the state filed its reply on June 1, 1998.

On June 3, 1998, the magistrate judge issued his report recommending that Ford's petition be dismissed with prejudice as untimely. On June 23, 1998, Ford filed an objection to the magistrate's report. On June 30, 1998, the district judge adopted the magistrate's findings, conclusions, and recommendations and dismissed Ford's petition with prejudice. On July 27, 1998, Ford filed a notice of appeal and a motion for a COA. The district court denied the motion on August 3, 1998. Ford then filed a motion for a COA in this court.

### C. Consolidation Of Cases

On January 22, 1999, we consolidated Ford's two cases — the Weed case and the Loguercio case — and granted his request for a COA on the question whether his federal habeas petitions were timely under AEDPA's one-year statute of limitations, 28 U.S.C. § 2254(d).

## II. ANALYSIS

We review a district court's decision to dismiss a petition for a writ of habeas corpus, including a dismissal on timeliness grounds, *de novo*. *See Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999). Because Ford's convictions and sentences in both the Weed and Loguercio cases became final prior to the enactment of AEDPA, Ford had one year from AEDPA's effective date of April 24, 1996 in which to file his federal habeas corpus petitions. *See* 28 U.S.C. § 2254(d); *Patterson v. Stewart*, 251 F.3d 1243, 1245 (9th Cir. 2001). Thus, absent statutory or equitable tolling, Ford's federal habeas petitions would be timely only if filed prior to April 24, 1997. *See id.* at 1244 (holding that Federal Rule of Civil Procedure 6(a) applies to the calculation of AEDPA's one-year statute of limitations).

In both the Loguercio and Weed cases, Ford's initial federal habeas petitions were timely filed.

Ford signed both of his initial federal habeas petitions on April 19, 1997, five days before his one-year statute of limitations would have run. The petitions were lodged as received by the district court on April 25, 1997 and subsequently filed on May 5, 1997. According to the prisoner's mailbox rule, Ford's petitions are deemed "filed" for purposes of AEDPA's statute of limitations the moment that he delivers them to the prison authorities for forwarding to the clerk of the district court. *See, e.g., Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001); *Saffold v. Newland*, 224 F.3d 1087, 1091 (9th Cir. 2000), *vacated on other grounds sub nom. Carey v. Saffold*, 536 U.S. 214 (2002). Because Ford signed both petitions and delivered them to the prison authorities for mailing before April 24, 1997, the petitions were timely filed.

### A. The District Court's Failure to Inform Ford About its Ability To Consider his Stay Motions

Along with the habeas petitions, Ford filed motions asking the district court to stay the petitions on the exhausted claims while he returned to state court to exhaust the then-unexhausted claims. The district court correctly stated that it did not have the discretion to stay Ford's mixed petitions. *See Rose*, 455 U.S. at 509 (holding that the district court must dismiss a habeas petition containing unexhausted claims); *Calderon v. District Court (Gordon)*, 107 F.3d 756 (9th Cir. 1997) (stating that it was error for the district court to stay federal habeas proceedings in order to permit a petitioner who filed a mixed petition to exhaust his unexhausted claims in state court); *Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir. 1997) (rejecting an argument that the district court abused its discretion when it dismissed, rather than stayed, a mixed petition and holding that the district court was obligated under *Rose* to dismiss the mixed



petition).[6] However, the district court could have entertained Ford's motions for a stay had he opted to dismiss the unexhausted claims from his petitions and proceed with only the exhausted claims. In that case, the district judge could have granted the stay motions, thus permitting Ford to exhaust his then-unexhausted claims in state court. This would have advanced the court's interest in "facilitat[-ing] decision on the merits, rather than on pleadings or technicalities." *James v. Giles*, 221 F.3d 1074, 1078 (9th Cir. 2000). As we recently said in *Kelly v. Small*, "The exercise of discretion to stay the federal proceeding is particularly appropriate when an outright dismissal will render it unlikely or impossible for the petitioner to return to federal court within the one year limitation period imposed by [AEDPA]." *Kelly*, 315 F.3d at 1070; *see also Freeman v. Page*, 208 F.3d 572, 577 (7th Cir. 2000), *cert. denied*, 531 U.S. 946 (stating that outright dismissal of a mixed federal habeas petition "is not proper when that step could jeopardize the timeliness of a collateral attack"), *cert. denied*, 531 U.S. 946. When Ford returned to federal court, the district judge could then have permitted Ford to amend his originally-filed federal petitions to incorporate the newly-exhausted claims. *See, e.g., James*, 269 F.3d at 1126-27 (holding that "a district court may, in its discretion, allow a petitioner to amend a mixed petition by deleting the unexhausted claims, hold the exhausted claims in abeyance until the unexhausted claims are exhausted, and then allow the petitioner to amend the stayed petition to add the nowexhausted claims"); *Taylor*, 134 F.3d at 989 (same); *Fetterly v. Paskett*, 997 F.2d 1295, 1301-02 (9th

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6. *But see Neuschafer v. Whitley*, 860 F.2d 1470, 1472 n.1 (9th Cir. 1988) ("When a petitioner has not exhausted his state remedies before filing a federal habeas petition, a district court may hold the federal petition in abeyance, issue a stay of execution, and allow the petitioner an opportunity to exhaust his state remedies."). We subsequently stated that the *Neuschafer* footnote did not apply to cases involving mixed federal habeas petitions. *See Taylor*, 134 F.3d at 989; *see also Greenawalt*, 105 F.3d at 1274 (characterizing the footnote as dicta).

Cir. 1993) (holding that the district court has the discretion to stay a habeas corpus petition containing only exhausted claims to give the petitioner time to exhaust several newly-discovered claims in state court).

**[1]** In this case, however, the district court did not inform Ford, who was proceeding *pro se* at the time, about the highly technical requirement that he must first dismiss the unexhausted claims and then renew the stay motions that he attempted to make prematurely, despite our past admonition that "[t]he rights of *pro se* litigants require careful protection where highly technical requirements are involved, especially when enforcing those requirements might result in the loss of the opportunity to prosecute or defend a lawsuit on the merits." *Garaux v. Pulley*, 739 F.2d 437, 439-40 (9th Cir. 1984). We have repeatedly emphasized that a *pro se* litigant "is entitled to certain procedural protections." *James*, 269 F.3d at 1126; *see also Haines v. Kerner*, 404 U.S. 519, 529 (1972) (holding that courts must liberally construe *pro se* pleadings); *Johnson v. State of California*, 207 F.3d 650, 653 (9th Cir. 2000) (same). With respect to *pro se* pleadings, we have held that "before dismissing a *pro se* complaint the district court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992); *see also James*, 269 F.3d at 1126 ("This court has held that leave to amend, though within the discretion of the trial court, should be guided by the underlying purpose of Rule 15(a) of the Federal Rules of Civil Procedure, which was to facilitate decision on the merits, rather than on technicalities or pleadings."); *James*, 221 F.3d at 1077 (stating that *pro se* habeas litigants are entitled to a "statement of the grounds for dismissal and an opportunity to amend the complaint to overcome [any] deficiency unless it clearly appears from the complaint that the deficiency cannot be overcome by



amendment" (internal quotations omitted)).[7]

**[2]** Here, there was a procedural deficiency — the filing of mixed habeas petitions — that prevented the district court from considering Ford's stay motions. To correct that deficiency, Ford was required to amend his habeas petitions to dismiss the unexhausted claims and proceed with only the exhausted claims, and then seek a hearing on the motions to stay the exhausted claims. Given that Ford was proceeding *pro se*, the district court was obligated to inform him of his options with respect to his mixed habeas petitions: to advise him that it would have the power to consider his stay motions only if he opted to proceed with his exhausted claims and dismiss the unexhausted claims. *See Zarvela*, 254 F.3d at 382.

**[3]** Had Ford been properly informed of the applicable legal procedure, he in all likelihood would have chosen to amend his petitions and the district court almost certainly would have granted the stay motions. *See id.* at 380 (holding that granting a stay is "the only appropriate [remedy] where an outright dismissal 'could jeopardize the timeliness of a collateral attack'" (quoting *Freeman*, 208 F.3d at 577)); *see also Kelly*, 315 F.3d at 1070 (finding that the decision "to stay the federal proceeding is particularly appropriate when an outright dismissal will render it unlikely or impossible for the petitioner to return to federal court within the one-year limitation period imposed by [AEDPA]."). Thus, the district

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7. *See also Lucas v. Department of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995) ("When the district court transforms a dismissal into a summary judgment proceeding, it must inform a plaintiff who is proceeding pro se that it is considering more than the pleadings, and must afford a reasonable opportunity to present all pertinent material [because the] notice requirement is consistent with the rule of liberal construction of pleadings presented by *pro se* litigants, particularly when dismissal is considered." (internal quotations omitted)); *cf. Wyatt v. Terhune*, 315 F.3d 1108, 1118-19 (9th Cir. 2003) (construing the Prison Litigation Reform Act's exhaustion requirement as an affirmative defense rather than a technical pleading requirement because, to hold otherwise, "would run contrary to the liberal approach we take to pleadings by *pro se* prisoners").

court, by failing to inform Ford about an option that, if taken, would have permitted the district court to grant his stay motions on the merits, deprived him of "a meaningful opportunity to amend" his pleadings. *James*, 269 F.3d at 1126. More important, the district court's failure to so inform Ford deprived him of the opportunity to exhaust his unexhausted claims and then amend the stayed petitions to incorporate the newly-exhausted claims, and thus to preserve his right to pursue all of his claims. *See Anthony*, 236 F.3d at 577 (holding that amendment of habeas petitions under Federal Rule of Civil Procedure 15(c) should be "freely given"). Our analysis is not affected by the fact that the district court has discretion to grant or deny Ford's stay requests, especially where, as here the discretion is more a matter of form than substance, and a denial of the request would likely constitute error. As the First Circuit recently recognized, "[T]here is a growing consensus that a stay is required when dismissal could jeopardize the petitioner's ability to obtain federal review." *Nowaczyk v. Warden, N.H. State Prison*, 299 F.3d 69, 79 (1st Cir. 2002); *see also Zarvela*, 254 F.3d at 380 (explaining why the district court is required to grant a stay when the failure to do so would, as here, forfeit petitioner's federal claims); *Freeman*, 208 F.3d at 577 (holding that dismissal is "not proper" if it could "jeopardize the timeliness of a collateral attack"); *James*, 269 F.3d at 1126 (holding that it is error to fail to inform a habeas petitioner about his opportunity to amend a partially-exhausted petition even though the decision to grant leave to amend is within the discretion of the trial court). Because the district court's failure to explain the procedural deficiency that precluded it from granting Ford's stay motions deprived Ford of a fair and informed opportunity to have his stay motions heard, to exhaust his unexhausted claims, and ultimately to have his claims considered on the merits, we conclude that the district court's action constituted prejudicial error.



### B. The District Court's Failure to Inform Ford that he was Time-Barred Under AEDPA

**[4]** The district court's failure to ensure that Ford had the opportunity to make an informed choice as to whether to amend the petitions extends beyond its failure to inform him of the necessity of doing so in order to have his stay motions considered by the court. The district court further erred when it failed to inform Ford that, on the face of the complaints, he would be time-barred under AEDPA on all of his claims if he either failed to amend his petitions or chose the option of dismissing them and returning to state court to exhaust the unexhausted claims. Although Ford timely filed both of his initial federal habeas petitions, he was only timely by a few days. *See supra* Section II. Over four months then passed before the magistrate judge issued his findings and recommendations in Ford's two cases. Because AEDPA's one-year limitations period is not statutorily tolled during the pendency of a federal habeas petition, *see Duncan v. Walker*, 533 U.S. 167 (2001), the statute of limitations was still running during that four month period. Thus, when the district court gave Ford the option to dismiss his petitions and return to state court to exhaust his then-unexhausted claims, his time for filing new federal petitions had already expired by more than four months (barring an extension on the ground of equitable tolling). Predictably, when he returned to federal court after having exhausted his claims in state court, his federal petitions were dismissed as time-barred.

**[5]** When the district court presented Ford with the option of either dismissing his mixed petitions and returning to state court to exhaust his then-unexhausted claims or amending the petitions to proceed with only the exhausted claims, it not only failed to inform him that on the face of the complaints AEDPA's one-year statute of limitations had run on both of his petitions and that his petitions would therefore be barred from re-filing in federal court if he elected the court's first option, but

it definitively, although not intentionally, misled him by informing him that if he opted to dismiss the petitions to return to state court to exhaust his claims, the dismissal would be *without prejudice*. *See Tillema v. Long*, 253 F.3d 494, 503-04 (9th Cir. 2001) ("Because there is no statutory tolling of AEDPA's limitation period during the pendency of federal habeas petitions, the district court's erroneous dismissal of Tillema's petition would, barring some other circumstance, have literally and immediately extinguished his right to federal habeas review. In this case, therefore, it cannot accurately be said that the dismissal of Tillema's petition was, as the court's order stated, 'without prejudice.'"); *Anthony*, 236 F.3d at 573 (recognizing that "AEDPA's one-year statute of limitations . . . has rendered outright dismissal perilous to some litigants, because petitioners . . . may find themselves time-barred when they attempt to resubmit their exhausted claims to the district court"). Other circuits have also noted the deceptive nature of a dismissal without prejudice when the claims dismissed are time-barred; in *Rodriguez v. Bennett*, 303 F.3d 435 (2d Cir. 2002), for example, the Second Circuit explained that for a petitioner dismissed 'without prejudice' after a year in federal habeas proceedings, 'the 'without prejudice' provision was an illusion; petitioner could never succeed in timely refiling the petition because he would already be time-barred.' *Rodriguez*, 303 F.3d at 439. [¶] We have recognized a district court's obligation to avoid misleading petitioners. In *Valerio v. Crawford*, 306 F.3d 742 (2002), *cert. denied*, ___ S. Ct. ___ (2003), the en banc court instructed the district court to inform a petitioner when claims to be dismissed 'without prejudice' would actually be time-barred. *See Valerio*, 306 F.3d at 770-71. This simple step helps avoid the unnecessary forfeiture of petitioners' constitutional rights. Here, what the district court should have told Ford is that the dismissal, although ostensibly without prejudice, would actually result in a dismissal *with prejudice* unless he could establish that at the time of dismissal he was entitled to equitable tolling. More generally, as the



Second Circuit said in *Zarvela*, a case in which the AEDPA period had not yet run, the district court, when informing a habeas petitioner of his options with respect to a mixed petition, should "alert the petitioner to the one-year limitations period of AEDPA and to the fact that a portion of that period has already elapsed." *Zarvela*, 254 F.3d at 382. Indeed, a district court is obligated to do no less. Here, the district court's failure to alert Ford to the current status of his claim under the AEDPA one-year statute of limitations clearly deprived him of the opportunity to make a "meaningful" choice between the two options. *See Valerio*, 306 F.3d at 770-71 (finding that the district court must inform the petitioner of a potential time-bar before the petitioner chooses whether to amend his mixed petition, in order to make that choice meaningful); *James*, 269 F.3d at 1126; *Ferdik*, 963 F.2d at 1261.[8] The error was

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8. Contrary to the dissent's assertion, requiring the district judge to inform a *pro se* petitioner if, on the face of his complaint, the AEDPA one-year statute of limitations has expired during the pendency of his federal habeas petition does not transform the district judge into the petitioner's paralegal. Nor, of course, does requiring him to advise *pro se* petitioners of the existence of the AEDPA one-year limit and the fact that a portion of that period has already elapsed. We already require the district judge to inform a *pro se* habeas petitioner that he has the option of dismissing the mixed petition without prejudice and returning to state court to exhaust the then-unexhausted claims. *See e.g., James*, 269 F.3d at 1125-26. To accurately explain this option, the judge must inform the petitioner if, on the face of the complaint, the AEDPA statute of limitations has expired such that any dismissal of the mixed petition would necessarily be "with prejudice," absent equitable tolling. *See Valerio*, 306 F.3d at 770-71. To do otherwise affirmatively misleads the *pro se* petitioner about the options available to him.

Our holding today does not open the floodgates, as our dissenting colleague fears, for future requirements that district judges inform *pro se* petitioners about the many factors that could affect petitioners' decisions regarding how to proceed with mixed petitions. Notifying a *pro se* plaintiff of the existence of the AEDPA limitation and the fact that part or all of that period (whichever is the case) has already run is a relatively simple task. Judge Silverman is undoubtedly correct that a number of factors could and likely would affect a petitioner's decision regarding how to proceed. What

particularly egregious because it inevitably resulted in the subsequent dismissal of all of Ford's claims as time-barred. *See Garaux*, 739 F.2d at 439-40 (stating that the protection of a *pro se* litigant's rights is particularly important when highly technical pleading requirements "might result in the loss of the opportunity to prosecute or defend a lawsuit on the merits."). Because the district court's failure fairly or fully to explain the consequences of the options it presented to Ford deprived him of the opportunity to make a meaningful choice, and as a result subsequently caused the district court to conclude that all of his claims were time-barred, we conclude that the failure constituted prejudicial error.

### C. The Effect of the District Court's Failure to Inform Ford of his Options before Dismissing his Initial Federal Habeas Petitions on the Timeliness of his Second Federal Habeas Petitions[9/]

**[6]** The district court's failure to inform Ford, before dismissing his initial petitions, that his claims would be time-barred under AEDPA if he chose to dismiss the petitions and return to state court, and that the district court could not

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his dissent fails to recognize, however, is that the district judge, when informing the petitioner about his options, does not ordinarily discuss (let alone affirmatively mislead the petitioner about) any of these other factors. In contrast, the judge affirmatively misleads the petitioner by stating that dismissal of a mixed petition is "without prejudice" if AEDPA's one-year statute of limitations had already expired while the federal court was considering the mixed petition. A district judge need not advise a *pro se* petitioner about every possible factor that could affect his decision, but when he does inform the *pro se* petitioner about his options, he must at the very least provide accurate, and not misleading, information.

9. The analysis in this section relates to those claims in Ford's second federal habeas petitions that were originally filed in his initial federal habeas petitions. See *infra* Section II.D. for a discussion of the claims that were asserted for the first time in Ford's second federal habeas petitions.



consider his stay motions and hold the petitions in abeyance unless he opted to proceed with his exhausted claims, necessarily affects our analysis of its decision to dismiss his second petitions, because, had the district court fairly and properly explained Ford's options to him, it is most unlikely that his second petitions would have been dismissed as time-barred. Rather, Ford would almost certainly have amended his mixed petitions by dismissing the then-unexhausted claims, moved for and undoubtedly received a stay of his exhausted claims, exhausted the then-unexhausted claims, and successfully amended the initial petitions to include the newly-exhausted claims. *See, e.g., Taylor*, 134 F.3d at 989 (describing the three-step process for amending a mixed petition, staying the exhausted claims, and re-filing an amended petition).

**[7]** Although we cannot place Ford back in the same position that he was in before the erroneous dismissal of his initial petitions, we can ensure that his rights are not unduly prejudiced as a result of the district court's errors. Toward that end, we hold that a *pro se* habeas petitioner who files a mixed petition that is improperly dismissed by the district court, and who then (following the district court's erroneous legal statements) returns to state court to exhaust his unexhausted claims and subsequently re-files a second petition without unreasonable delay, may employ the amendment procedures of Federal Rule of Civil Procedure 15(c) ("Rule 15(c)") to have the second petition relate back to and preserve the filing date of the improperly-dismissed initial petition.[10/] In so doing we follow the approach taken by the Second Circuit in *Zarvela*, which held under similar circumstances that "[a] *pro se* litigant should [not] lose his opportunity to present his constitutional challenge to his conviction." *Zarvela*, 254 F.3d at 382-83.

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10. Rule 15(c) provides that "[a]n amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

We have previously held that if a habeas petitioner's mixed petition is *properly* dismissed without prejudice and he *accepts* the proper dismissal of that mixed petition, he may not later employ Rule 15(c)'s relation back doctrine to justify an untimely-filed second petition. *See Green v. White*, 223 F.3d 1001, 1002 (9th Cir. 2000); *Van Tran v. Lindsey*, 212 F.3d 1143, 1148 (9th Cir. 2000), *cert. denied*, 531 U.S. 944, *overruled on other grounds by Locker v. Andrade*, 123 S. Ct. 1166, ___ (2003); and *Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir. 1999). We have also held, however, that if a mixed petition is *improperly* dismissed without prejudice and the petitioner does *not accept* the improper dismissal, but elects instead to submit a second petition with only the exhausted claims, the court may treat the second petition as an amendment that relates back to and preserves the original filing date of the mixed petition under Rule 15(c), even if the AEDPA statute of limitations expired prior to the second filing. *See Anthony*, 236 F.3d at 572-74. Ford's petitions, like the petition in *Anthony* and unlike the petitions in *Green, Van Tran*, and *Henry*, were *improperly* dismissed by the district court.[11] Moreover, in Ford's case, like Anthony's and unlike in Green's, Van Tran's, and Henry's, there was no informed acceptance by the petitioner of the district court's dismissal of the mixed petitions.[12]

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11. *Compare Anthony*, 236 F.3d at 574 (holding that the district court's outright dismissal of Anthony's mixed petition without having adequately informed him of his options was "improper") *and* discussion *supra* Sections II.A. & II.B. (explaining why Ford's initial habeas petitions were improperly dismissed) *with Anthony*, 236 F.3d at 574 n.1 (stating that the dismissal of the mixed habeas petitions in *Green, Van Tran*, and *Henry* were "proper").

12. The petitioners in *Green, Van Tran* and *Henry* "accepted" the proper dismissal of their mixed petitions and indeed had no reason not to. The district court's orders dismissing the petitions without prejudice accurately stated the then-applicable law, because the dismissals occurred prior to AEDPA's effective date. *Compare* discussion *supra* Section II.A. & II.B (explaining why Ford's "acceptance" of the dismissal of his initial petitions without prejudice was not only uninformed but was based on misleading statements of the law by the district court and was therefore invalid).



Although the petition that Anthony submitted after his mixed petition was improperly dismissed contained only his exhausted claims, we see no difference for AEDPA statute of limitations purposes between Anthony's action and Ford's decision to rely on the district court's erroneous instruction and to re-submit all of his claims after exhausting the unexhausted ones in state court.[13] Thus, we hold that Ford, like Anthony, is entitled to apply Rule 15(c) to his later-filed petitions.[14]

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13. In both Ford's case and Anthony's, the second petitions were filed after the AEDPA one-year limitations period had expired. In neither case did the petitioners unreasonably delay in taking the actions that they took. Ford, after timely pursuing exhaustion in state court by filing a state habeas petition within three weeks of the federal court's dismissal of his mixed petitions, re-filed his petitions in federal court within two weeks of the state court's dismissal of his state habeas petitions. *See Zarvela*, 254 F.3d at 381 (holding that a habeas petitioner has not unreasonably delayed if he files a state habeas petition within 30 days of the federal court's dismissal of his mixed petition and if he re-files in federal court within 30 days of the state court's denial of his claims). Anthony also "proceeded with reasonable diligence." *Anthony*, 236 F.3d at 577.

14. The dissent relies principally on our decision in *Green v. White*, 223 F.3d 1001 (9th Cir. 2000), in which we held that Green's second habeas petition did not relate back to his first mixed petition after the mixed petition had been dismissed without prejudice and the petitioner had returned to state court to exhaust his then-unexhausted claims. The dissent argues that the facts in Ford's cases are exactly like those in *Green* and that *Green* therefore compels us to uphold the district court's dismissal of Ford's second petitions as time-barred. This assertion, however, ignores three critical and dispositive differences between Ford's cases and *Green*.

First, while Ford was proceeding *pro se* when he filed his first and second habeas petitions, nowhere in the *Green* opinion does it state that Green was proceeding without counsel. In fact, one of Green's contentions on appeal was that the AEDPA statute of limitations should be equitably tolled "because any delay [wa]s a result of his *and his attorney's* reliance" on Supreme Court precedent. *Green*, 223 F.3d at 1003 (emphasis added). As we emphasized *supra* Sections II.A & II.B., Ford's *pro se* status is one

One problem remains with respect to the remedy available to Ford. We cannot now return the parties to the point where the district court could decide whether to grant a stay to permit Ford to exhaust his claims. Events have overtaken us. Ford has already exhausted all of his claims. As a result, there is no purpose to be served by returning this case to the district court and requiring the district judge to rule on the stay motions. Rather, we agree with the Second Circuit that, "[b]ecause [petitioner's] initially filed petition was timely when filed and should have been stayed, subject to appropriate conditions, and because his prompt trip to and from the state courts satisfied the conditions that should have been included in a stay, the initial petition may be considered on its merits." *Zarvela*, 254 F.3d at 383. Thus, we treat Ford's initial petitions as if the district court had permitted him to dismiss the unexhausted claims and had then granted his stay motions in order to allow him to exhaust his then-unexhausted claims. Applying Rule 15(c) to

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of the principal reasons why we hold that the district judge's failure fairly and fully to inform him about his options with respect to the mixed petitions and the stay motions constitutes prejudicial error.

Second, the district judge in *Green* did not mislead Green when he informed him that he had the option of dismissing his mixed petition without prejudice in order to return to state court to exhaust his then-unexhausted claims. At the time that the district court dismissed Green's initial habeas petition without prejudice, Green still had almost 11 months remaining in his one-year AEDPA statute of limitations in which to exhaust his then-unexhausted claims.

Finally, there is no indication that Green ever filed a motion to stay the federal habeas proceedings so that he could exhaust the unexhausted claims in his initial mixed petition. Ford did file stay motions. The district court's error in failing to inform Ford that his motions could not be considered unless he opted to amend his mixed petition and dismiss his thenunexhausted claims is sufficient, standing alone, to merit relief.



Ford's current petitions, we further hold that those claims that were originally included in his initial petitions relate-back and serve to amend the improperlydismissed claims in his initial petitions. Because Ford's initial habeas petitions were filed within AEDPA's one-year statute of limitations, his amended petitions relate back to that filing date and are therefore timely with respect to the claims included in those initial petitions.[15/]

### D. Claims Ford Asserts for the First Time in his Second Federal Habeas Petitions

Although we hold that those claims that were originally asserted in Ford's initial petitions and then subsequently reasserted in his second petitions were timely filed under Rule 15(c), the same analysis does not apply to the claims that Ford asserted for the first time in his second petitions. Rule 15(c)

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15. Although we need not reach the question here, Ford would also be entitled to relief under equitable tolling principles. The district court's error in failing properly and fully to inform Ford about his options with respect to the mixed petitions and in misleading him as to the legal effect of a dismissal of his petitions were "extraordinary circumstances" beyond Ford's control that would require equitable tolling of AEDPA's statute of limitations. *See, e.g., Tillema*, 253 F.3d at 504 (holding that the district court's failure to afford a federal habeas petitioner who filed a mixed petition the opportunity to abandon his sole unexhausted claim as an alternative to dismissal of his first habeas petition entitled him to equitable tolling). The Fifth Circuit recently found similar circumstances appropriate for equitable tolling in the context of a prisoner's § 1983 suit dismissed ostensibly without prejudice for failure to exhaust administrative remedies. In *Clifford v. Gibbs*, 298 F.3d 328 (5th Cir. 2002), the court recognized the impropriety of a dismissal without prejudice that actually left claims "forever precluded." *Id.* at 333. It held that claims should be equitably tolled when the "district court's dismissal . . . without prejudice actually operates as a dismissal with prejudice because [the petitioner] is barred from returning to federal court after exhausting his remedies because limitations has already run." *Id.* Ford faced the same constraints. However, because we grant Ford relief on statutory grounds, we do not resolve any equitable tolling claim here.

specifically states that the claim or defense asserted in the amended pleading must "ar[i]se out of the conduct, transaction, or occurrence *set forth or attempted to be set forth in the original pleading*" (emphasis added). In this case, there were two claims in the Loguercio case and five claims in the Weed case that Ford raised in his second petitions that he did not raise in his initial petitions.[16] Because those claims were not set forth in the original pleadings and were not "newly discovered" claims, *see Fetterly*, 997 F.2d at 1299-1301,[17] we hold that Ford may not invoke Rule 15(c) to add them to his petitions at this late stage. *See Anthony*, 236 F.3d at 576 (stating that one of the central policies of Rule 15(c) is to "ensur[e] that the non-moving party has sufficient notice of the facts and claims giving rise to the proposed amendment").[18]

With respect to the claims raised for the first time in the second Weed petition, Ford contends that AEDPA's one-year statute of limitations should be equitably tolled because he did not receive the complete set of his legal papers from his appellate attorney until July of 1997. If the statute of limitations were tolled until July of 1997, Ford's April, 1998 second

16. *See supra* notes 2 & 4 (listing the new claims).

17. With respect to the newly-asserted claim of a due process violation resulting from the use of testimony obtained from a drugged alleged coconspirator in the Weed case, Ford argues that he did not discover that the main witness against him, Jan Olgilvie, was threatened by the police and drugged until after his conviction was final. However, letters between Ford and Olgilvie demonstrate that Ford was aware of the threats and use of drugs as early as May of 1993; yet, he did not file his first federal habeas petitions until April of 1997.

18. Ford contends that all of his Weed claims — not only the claims raised for the first time in the second petition, but those asserted in the first petition as well — should be heard on the merits because he passes through the "actual innocence" gateway of *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995). We reject this argument because Ford has not presented sufficient evidence to pass through that gateway.



federal habeas petition would be timely under AEDPA. In support of this equitable tolling claim, Ford submitted letters that he exchanged with his former counsel demonstrating his attempts to obtain his legal papers. The State points out, however, that, according to the correspondence, Ford's counsel first forwarded his file to him in June of 1995 and that Ford waited over two years, until after the AEDPA statute of limitations period had expired, to write his counsel stating that he did not receive a complete set of records. Ford responds by asserting that he was unsuccessfully trying to obtain the complete record from his counsel during the two year period between 1995 and 1997 — a fact that, on the record before us, is uncorroborated by independent evidence. Several courts have held that a lack of access to one's legal papers may constitute an "extraordinary circumstance" that would warrant equitable tolling in instances in which the state is responsible for the unavailability. *See, e.g., Whalem/Hunt*, 233 F.3d at 1146; *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000) (holding that confiscation of legal papers constitutes an "extraordinary circumstance"). Although routine instances of attorney negligence do not generally constitute "extraordinary circumstances" entitling a habeas petitioner to equitable tolling, *see, e.g., Miranda v. Castro*, 292 F.3d 1063 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 496 (holding that attorney miscalculation of AEDPA limitations period did not merit equitable tolling),[19] there are instances in which an attorney's

19. *See also Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001), *cert. denied*, 535 U.S. 1055 (2002) ("[T]he miscalculation of the limitations period by . . . counsel and his negligence in general do not constitute extraordinary circumstances sufficient to warrant equitable tolling."); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (9th Cir. 2000), *cert. denied*, 534 U.S. 863 (2001) (stating that "counsel's confusion about the applicable statute of limitations does not warrant equitable tolling"); *United States v. Saro*, 252 F.3d 449, 455 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1149 (2002) (finding no extraordinary circumstances because although lawyer failed to file, petitioner did not file on his own until three months

failure to take necessary steps to protect his client's interests is so egregious and atypical that the court may deem equitable tolling appropriate, see, *e.g., Calderon v. U.S. Dist. Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997) (holding that AEDPA's statute of limitations was equitably tolled when the petitioner's counsel unexpectedly moved out of the state and left an unusable work product behind for replacement counsel), *overruled on other grounds by Calderon v. U.S. Dist. Court (Kelly)*, 163 F.3d 530, 540-41 (9th Cir. 1998) (en banc).[20/]

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later); *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) (stating that counsel's mistake in interpreting a statutory provision does not constitute extraordinary circumstances); *Sandvik v. United States*, 177 F.3d 1269, 1272 (11th Cir. 1999) (stating that counsel's use of regular mail as opposed to private delivery service does not merit equitable tolling); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (stating that "normally, however, a lawyer's mistake is not a valid basis for equitable tolling").

20. *See also Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001), *cert. denied*, 534 U.S. 944 (recognizing that, in a few cases, egregious conduct of counsel will merit equitable tolling); *Plowden v. Romine*, 78 F. Supp. 2d 115, 119 (E.D.N.Y. 1999) (same); *Vasquez v. Greiner*, 68 F. Supp. 2d 307, 309-11 (S.D.N.Y. 1999) (stating that equitable tolling may be available to a habeas petitioner who did not learn from his attorney that his conviction was final until after the AEDPA limitations period had expired); *Baskin v. United States*, 998 F. Supp. 188, 189-90 (D. Conn. 1998) (granting equitable tolling to a habeas petitioner because his counsel waited thirteen months to tell him that his petition for certiorari had been denied).

In a related context, there are several cases in which courts have held that egregious conduct by counsel warrants equitable tolling of the statute of limitations for filing an EEOC complaint. *See, e.g., Seitzinger v. Reading Hosp. and Med. Ctr.*, 165 F.3d 236, 239-41 (3d Cir. 1999) (stating that "[t]here are, however, narrow circumstances in which the misbehavior of an attorney may merit such equitable relief" and finding that this was such a case because counsel lied to his client when he told him that he had filed a petition); *Cantrell v. Knoxville Comm. Dev. Corp.*, 60 F.3d 1177, 1180-81 (6th Cir. 1995) (stating that this case was not "'garden variety' attorney negligence" because counsel abandoned his client due to counsel's mental illness); *Doherty v. Teamsters Pension Trust Fund*, 16 F.3d 1386, 1394 (3d Cir. 1994) (stating that, although attorney mistakes do not normally constitute extraordinary circumstances, in a case in which counsel filed a



There are no cases in this circuit determining whether an attorney's failure or refusal to provide a habeas client with important parts of his legal file may rise to the level of "extraordinary circumstances" for purposes of equitable tolling. We prefer not to decide that question here, because the factual record is insufficiently developed. As in *Whalem/Hunt*, 233 F.3d at 1148, the district court in Ford's case did not give the petitioner an opportunity to amend his petition or expand his declaration and did not hold an evidentiary hearing. Because equitable tolling issues "are highly fact-dependent, and because the district court is in a better position to develop the facts and assess their legal significance in the first instance," *id.*, we remand Ford's additional Weed claims to the district court with instructions that it develop an adequate evidentiary record before again determining whether the statute of limitations should be equitably tolled as to those claims.[21/]

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complaint in the wrong forum due to stress resulting from the death of co-worker, equitable tolling may be justified); *Burton v. U.S. Postal Serv.*, 612 F. Supp. 1057, (N.D. Ohio 1985) (holding that equitable tolling is available when an attorney abandoned his client and left town). Some courts have cited to these cases as examples of conduct by attorneys that may justify equitable tolling under AEDPA. *See, e.g., Fahy*, 240 F.3d at 244; *Plowden*, 78 F. Supp. 2d at 119.

Similarly, a number of courts, including this court, have held that a client who demonstrates gross negligence on the part of his attorney has established the requisite "extraordinary circumstances" to set aside a default judgment under Federal Rule of 60(b)(6). *See, e.g., Community Dental v. Tani*, 282 F.3d 1164, 1169 (9th Cir. 2002); *Boughner v. Secretary of Health, Educ. & Welfare*, 572 F.2d 976, 978 (3d Cir. 1978); *Shepard Claims Serv., Inc. v. William Darrah & Assocs.*, 796 F.2d 190, 195 (6th Cir. 1986); *L.P. Steuart, Inc. v. Matthews*, 329 F.2d 234, 235 (D.C. Cir. 1964).

21. With respect to the two ineffective assistance of counsel claims raised for the first time in Ford's second Loguercio petition, we affirm the district court's dismissal of the claims as time-barred. Ford has presented no reason why those two claims could not have been presented along with the others set forth in his initial petition, or why the purported absence of AEDPA materials from the library would have prevented him from filing the ineffective assistance of counsel claims but not the others. Our decision, of

## III. CONCLUSION

**[8]** With respect to those claims that were originally raised in Ford's initial federal habeas petitions and then re-filed in his second petitions, we vacate the district court's dismissal of the second petitions as untimely and remand them so that the district court may consider the claims on the merits. With respect to the five claims that were raised initially in Ford's second Weed petition, we vacate their dismissal and remand for the development of a factual record as to whether the statute of limitations should be equitably tolled. With respect to the two ineffective assistance of counsel claims raised for the first time in Ford's second Loguercio petition, we affirm their dismissal.

**AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS.**

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SILVERMAN, Circuit Judge, dissenting:

Ford filed an improper mixed petition. The district court correctly offered him the option of either amending the petition by deleting the unexhausted claims and proceeding with only those that had been exhausted, or suffering the dismissal of his entire petition without prejudice. This is exactly what a district court is supposed to do. *James v. Pliler*, 269 F.3d 1124, 1125-26 (9th Cir. 2001). When Ford did not express a choice, the district court again did exactly what it was supposed to do: It dismissed Ford's mixed petition without prejudice. *Rose v. Lundy*, 455 U.S. 509, 510 (1982); *James v. Pliler*, 269 F.3d at 1125.

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course, does not preclude the district court on remand from entertaining a motion for reconsideration of its decision should Ford make a sufficient showing as to why the ineffectiveness claims were not raised in the initial petition.



Ford never appealed the dismissal of that petition. (He still hasn't.) What he did instead was go back to state court and exhaust his remaining claims. He eventually returned to federal court and filed the new petitions that are the subject of this appeal. By that time, the statute of limitations had run and the petitions were dismissed as time-barred.

This was precisely the situation we upheld in *Green v. White*, 223 F.3d 1001 (9th Cir. 2000). Green's first, timely petition was dismissed without prejudice "apparently because Green had not exhausted his state remedies as to some claims." *Id.* at 1002. After exhausting his state remedies, Green returned to federal court. Like Ford, his claims had become time-barred. We held:

> Green obtained a voluntary dismissal of his earlier habeas petition in order to exhaust his state remedies. A second habeas petition does not relate back to a first habeas petition when the first habeas petition was dismissed for failure to exhaust state remedies. *See Van Tran v. Lindsey*, 212 F.3d 1143, 1148 (9th Cir. 2000). When the present petition was filed, there was no pending petition to which the new "petition could relate back or amend." *Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir. 1999). Therefore, Green's present petition does not relate back to his earlier petition that was dismissed.

*Id.* at 1003.

Because *Green* is identical to the present case in all material respects, the majority is forced to concoct a way around it. It does so by holding that *Green* does not apply if a mixed petition was "improperly dismissed." The majority then posits that the mixed petitions in present case *were* improperly dismissed because the district court did not warn petitioner that if he re-files, the statute of limitations might return to bite him.

There are several things wrong with this. In the first place,

the facts of this case are exactly like *Green*. The district court in the present case dismissed Ford's mixed petition in the same manner as the district court in Green's case dismissed his. The majority says that Green "accepted" the dismissal without prejudice while Ford did not. This is simply untrue. After their mixed petitions were dismissed, Ford and Green did exactly the same thing — they both headed back to state court without a peep. Ford did not appeal or otherwise complain about the dismissal of his mixed petitions any more than Green did. Ford did not even mention the district judge's failure to advise about the statute of limitations in *this* appeal until after argument, when *we* sua sponte called for additional briefing about the dismissal of the original mixed petitions. It is just flat wrong to say that Green accepted the dismissal without prejudice and that Ford did not.

The majority makes much of the point that when the district court dismissed Green's petition, Green still had eleven months of the statute of limitations left to run, while Ford's time had already expired. Therefore, says the majority, the dismissal of Ford's petition without prejudice was tantamount to a dismissal with prejudice. This argument fails to take account of the fact that the district judge will almost never be able to tell, solely from the face of the petition, that the statute of limitations has expired. The calculation of the limitations deadline requires the examination of documents that rarely, if ever, accompany the petition. There is nothing to show that Ford's petition was any different than the usual.

Dismissal without prejudice was not the equivalent of a dismissal with prejudice. Ford was perfectly free to re-file. If thereafter, the statute of limitations had been raised as an affirmative defense, Ford then would have been entitled to assert whatever factual, statutory, and equitable defenses to the statute of limitations he might have had. And if the statute of limitations had not been raised, it would have been waived.

More troubling is the new rule the majority enacts today. Boldly going where no court has gone before, the majority



holds that the district court, when complying with *James v. Pliler*, must incorporate a warning about the statute of limitations. Otherwise, says the majority, the dismissal is "improper." *James v. Pliler* does not require that, nor does any other case involving a routine mixed petition.

It is one thing to construe a pro se petitioner's pleadings liberally, and to require the district court to explain its reasons for dismissing a complaint. It is quite another thing to require the district court judge to act as petitioner's legal advisor. Numerous factors can affect a petitioner's decision to delete unexhausted claims and proceed with an amended petition, rather than accept dismissal without prejudice so that unexhausted claims can be pursued in state court. For example, the meritoriousness of the unexhausted claims is an extremely important factor; so is the fact that the failure-to-exhaust might foreclose those claims forever. The availability of key witnesses is another factor. The statute of limitations is only one element in the equation, and a fact-intensive one at that. Leaving aside the question of the proper role of the court as a neutral arbiter, the district court simply is in no position to identify all of the considerations that pertain. I respectfully suggest that it is the office of the court to fairly and impartially decide the case before it, not to act as the petitioner's paralegal.

The majority places great reliance on the Second Circuit's decision in *Zarvela v. Artuz*, 254 F.3d 374 (2d Cir. 2001), but even that case does not hold that it is error to dismiss a mixed petition without prejudice unless the petitioner is informed about the statute of limitations. In *Zarvela*, the Second Circuit held that a district judge has the discretion either to dismiss a mixed petition in its entirety, or to dismiss only the unexhausted claims and then stay the petition, conditioned on petitioner's prompt exhaustion and his prompt return to federal court. *Id.* at 376-77. The district judge allowed a previously withdrawn petition to be "reopened" and therefore, Zarvela's subsequent petition could relate back to the reopened petition which was then extant. *Id.* at 377. Like *James v. Pliler*, *Zarvela* says that

a district court faced with a mixed petition should advise a petitioner that his options are either to proceed with only the exhausted claims, or to return to state court. The most that *Zarvela* says about the statute of limitations is that it might be "useful" for the district court to alert a petitioner to the AEDPA statute of limitations. *Id.* at 382. This is a far cry from what the majority holds today.

The majority's reliance on *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002) (en banc) is likewise misplaced. *Valerio* involved highly unusual procedural circumstances of nearly Talmudic complexity, circumstances too convoluted to recount here. But in a nutshell, this court itself created a mixed petition for the petitioner by reinstating, on appeal, new unexhausted claims that had been dismissed by the district court for abuse of the writ. In a portion of the opinion entitled, "Procedure on Remand," the court sought to bring some order to the chaos by giving the district court detailed instructions on how to proceed from that point on, including the direction to inform Valerio of a possible time-bar in the event that the district court were to decline to follow the stay-and- abeyance procedure on remand. In no way, shape or form can *Valerio* be read to require *Miranda*-like warnings about the statute of limitations in the garden variety mixed-petition case.

The majority's reliance on *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003), is simply bizarre. The amended *Kelly* opinion was filed after the original opinion in this case (*Ford*) and relies on the original *Ford* opinion for support. *Id.* at 1070-71. Now, in its amended opinion, the majority in *this case (Ford)* relies on *Kelly*, which in turn relies on *Ford*. The wacky circularity of all of this does not change the fact that it was the *Ford* majority in *this* case that originally cooked up the rule on which the *Kelly* court relied, and with which I respectfully disagree for the reasons I've given.

Finally, in footnote 15, my colleagues advise that, "Although we need not reach the question here, Ford would also be entitled to relief under equitable tolling principles." The



majority then goes on to explain why, in its view, Ford *is* entitled to equitable tolling, and finally, in apparent recognition that the issue is not before the court, ends up by saying, "However, because we grant Ford relief on statutory grounds, we do not resolve any equitable tolling claim here." The majority's yearning to resolve Ford's supposed entitlement to equitable tolling is as puzzling as its denial that it is doing that very thing.

The essence of the majority's analysis of the equitable tolling issue it "need not reach" (but does anyway) is its view that Ford was "misled" by the district court's faithful compliance with the procedure set out in *James v. Pliler* and *Rose v. Lundy*. Equitable tolling requires that "extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) (quotations omitted). There were no extraordinary circumstances here. That the district court proceeded exactly as instructed in *James v. Pliler* is not an extraordinary circumstance. I do not share the majority's view that the district court "misled" Ford by following our precedent and the Supreme Court's mandate in *Rose v. Lundy*.

Ford did not raise equitable tolling in the district court. In fact, he hasn't even raised it in this appeal, not even after we invited supplemental briefing. That alone is reason to keep our mitts off equitable tolling. *Jiminez v. Rice*, 276 F.3d 478, 481-82 (9th Cir. 2001).

Because the district court correctly dismissed the second petitions as time-barred, I would affirm, and therefore respectfully dissent.

APPENDIX B

FILED
JUL 20 1998

ENTERED
JUL 27 1998

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA -**

**WESTERN DIVISION**

| | | |
|---|---|---|
| RICHARD H. FORD, | ) | CV 98-2557-RAP (SH) |
| | ) | |
| Petitioner, | ) | REPORT AND |
| | ) | RECOMMENDATION OF |
| v. | ) | UNITED STATES |
| | ) | MAGISTRATE JUDGE |
| S. HUBBARD, WARDEN, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

This Report and Recommendation is submitted to United States District Judge Richard A. Paez pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

## I. PROCEEDINGS

Petitioner, in state custody, filed a Petition for Writ of Habeas Corpus (the "Petition") pursuant to 28 U.S.C. §2254 on April 7, 1998. Respondent filed an Answer on April 29, 1998, followed by a Motion to Dismiss on June 17, 1998. Petitioner

filed an Opposition to respondent's Motion to Dismiss on June 17, 1998. On June 25, 1998, respondent informed this Court that it did not intend to file a Reply. The matter has been taken under submission.

## II. BACKGROUND

On January 16, 1988, petitioner, a California state prison, was found guilty of conspiracy to commit first degree murder, two counts of attempted murder, attempted administration of an intoxicating agent, conspiracy to commit robbery, three counts of robbery, and three counts of assault with a firearm. (MTD at 3.) On direct appeal, petitioner's convictions were confirmed by the California Court of Appeal. (Pet. at 3.) Petitioner filed a Petition for Review to the California Supreme Court, which was denied on January 14, 1993. (Pet. at 4.) The United States Supreme Court denied certiorari on June 14, 1993. Petitioner filed no Petition for Writ of Habeas Corpus in the California courts, or any other Petitions for Review to the California Supreme Court.

On May 5, 1997, petitioner filed a Petition for Writ of Habeas Corpus (the "1997 Petition") in this Court under Case No. 97-3385-RAP (SH). On September 11, 1997, this Court dismissed the 1997 Petition without prejudice due to petitioner's failure to exhaust state remedies with respect to certain claims raised in the 1997 Petition.

On September 29, 1997, petitioner filed a petition for writ of habeas corpus in the California Supreme Court, which petition was denied on March 25, 1998. (MTD, Ex. D.)

## III. DISCUSSION

In its Motion to Dismiss, respondent asserts that the instant Petition must be dismissed because it was not filed within the statutory deadline. The Magistrate Judge agrees with respondent's analysis, as shown below.



28 U.S. §2244, provides in relevant part:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.

The limitation period shall run from the latest of --

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection. (emphasis added).

Thus, Congress provided a one-year time limit for filing a habeas corpus petition in order to strengthen the policy favoring finality and comity. Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997).

Petitioner's state court judgment became final on January 14, 1993, when the California Supreme Court declined to review petitioner's convictions.[1/] (M.D. Ex. B.) As held in Beeler, the one-year period of limitations did not begin to run against petitioner until April 25, 1996, the date of the enactment

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1. Alternatively, petitioner's state court judgment became final on June 14, 1993, the day the United States Supreme Court denied certiorari.

of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Beeler, 128 F.3d at 1287. Thus, the statute of limitations began to run as to petitioner on April 24, 1996, and expired one year later on April 24, 1997. However, petitioner did not file a Petition in this Court until April 7, 1998, nearly one year beyond the one year limitation period.

This Court notes that petitioner filed a habeas petition in the California Supreme Court on September 29, 1997. However, petitioner does not receive any tolling benefit under 28 U.S.C. §2244(d)92) because he filed his habeas petition in the California Supreme Court on September 29, 1997, after the AEDPA statute of limitations had already expired. Also, the 1997 Petition filed in this Court in no way tolls the applicable statute of limitations.[2/] 28 U.S.C. §2244(d)(2) only permits a properly filed state petition for collateral review to toll the statute of limitations.

In his Opposition, petitioner maintains that, with respect to the dismissal of the 1997 Petition, he followed this Court's "recommendation" and exhausted his state remedies with respect to all unexhausted grounds set forth in the 1997 Petition. (Opp. p. 4.) However, this Court's dismissal of the 1997 Petition without prejudice in no way relieved petitioner from complying with the statutory deadline set forth in the AEDPA.[3/]

Beeler, supra, held that the one year period in which a state prisoner has to file a Petition for Writ of Habeas Corpus in the District Court constitutes a statute of limitations which may, on certain narrow circumstances, be tolled. Specifically, Beeler stated that "equitable tolling will not be available in most cases, as extensions of time will only be granted if "extraordinary

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2. The 1997 Petition was filed prematurely in this Court, as petitioner had not exhausted his state remedies with respect to certain claims. The 1997 Petition was dismissed without prejudice on September 11, 1997.

3. Moreover, petitioner concedes that the 1997 Petition was "improperly plead and prematurely submitted". (Opp. p. 3.)



circumstances beyond a prisoner's control make it impossible to file a Petition on time. [citation omitted] We have no doubt that district judges will take seriously Congress' desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted." Beeler, 128 F.3d at 1288-89.

Petitioner concedes that the instant Petition is untimely, but argues that he "diligently attempted to move this matter forward", but was impeded by prison "lock-downs" and other constraints. (Opp. p. 2.) He also alleges that he "was not informed [of the AEDPA] until February, 1997", and that he has had difficulty in obtaining "qualified instruction and/or assistance" regarding federal habeas corpus procedure. (Id. pp. 2, 4.) However, these allegations do not constitute any "extraordinary circumstances" as envisioned by the Beeler court. See also Calderon v. United States District Court (Kelly) 127 F.3d 782 (9th Cir. 1997); United States v. Van Poyck, 980 F. Supp. 1108 (C.D.Cal. 1997).

Nor does petitioner argue that he falls within the statutory tolling provisions of §2244(d)(1)(C) or §2244(d)(1)(D). He does not assert that he is relying on a constitutional right newly recognized by the United States Supreme Court, or on a newly discovered factual predicate.

## III. RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered dismissing the action with prejudice.

DATED: 7/20/98

s/_____
STEPHEN J. HILLMAN
UNITED STATES MAGISTRATE JUDGE

FILED
JUL 22 1998

ENTERED
JUL 27 1998

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA-**
**WESTERN DIVISION**

| | | |
|---|---|---|
| RICHARD H. FORD, | ) | CV 98-2557-RAP (SH) |
| | ) | |
| Petitioner, | ) | ORDER ADOPTING |
| | ) | REPORT AND |
| v. | ) | RECOMMENDATION |
| | ) | OF UNITED STATES |
| S. HUBBARD, WARDEN, | ) | MAGISTRATE JUDGE |
| | ) | |
| Respondent. | ) | |
| | ) | |

Pursuant to 28 U.S.C. Section 636(b)(1)(C), the Court has reviewed the Petition, all of the records and files herein and the attached Report and Recommendation of the United States Magistrate Judge, and has made a de novo determination of the Report and Recommendation. The Court concurs with and adopts the conclusions of the Magistrate Judge.

IT IS ORDERED that the Petition filed herein is dismissed with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by the United States mail on petitioner and counsel for respondent.



LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: July 22 '98

s/_____
RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE

FILED
JUL 22 1998

ENTERED
JUL 27 1998

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA-**
**WESTERN DIVISION**

| | | |
|---|---|---|
| RICHARD A. FORD, | ) | CV 98-2557-RAP (SH) |
| | ) | |
| Petitioner, | ) | JUDGMENT |
| | ) | |
| v. | ) | |
| | ) | |
| S. HUBBARD WARDEN, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

Pursuant to the Order of the Court adopting the conclusions and recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed with prejudice.

DATED: July 22, 98

s/_____
RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE



APPENDIX C

FILED
JUN 25 1998

ENTERED
JUN 30 1998

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA-**
**WESTERN DIVISION**

| | | |
|---|---|---|
| RICHARD HERMAN FORD, | ) | CV 98-2556-RAP (SH) |
| | ) | |
| Petitioner, | ) | REPORT AND |
| v. | ) | RECOMMENDATION |
| | ) | OF UNITED STATES |
| S. HUBBARD, Warden, | ) | MAGISTRATE JUDGE |
| | ) | |
| Respondent. | ) | |
| | ) | |

This Report and Recommendation is submitted to United States District Judge Richard A. Paez, pursuant to 28 U.S.C. § 636 and the General Order 194 of the United States District Court for the Central District of California.

## I. PROCEEDINGS

On April 7, 1998, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody (the "Petition") pursuant to 28 U.S.C. §2254. In the Petition, petitioner raises numerous grounds challenging his convictions for first degree murder for financial gain and conspiracy to commit murder. Respondent filed an Answer on April 29, 1998, followed by a Motion to Dismiss on May 11, 1998. Petitioner filed an

Opposition to respondent's Motion to Dismiss on May 27, 1998. Respondent filed a Reply on June 1, 1998. The matter has been taken under submission.

## II. BACKGROUND

On October 11, 1988, petitioner was convicted in Los Angeles County Superior Court of (1) one count of first degree murder for financial gain, in violation of California Penal Code §§ 187 and 190.2(a)(1), and (2) one count of conspiracy to commit murder, in violation of California Penal Code § 182. (M.D., Ex. A.)

The California Court of Appeal affirmed petitioner's convictions on November 16, 1992. (M.D., Ex. B.) On February 11, 1993, the California Supreme Court denied review. (Pet., p. 4.) The United States Supreme Court denied certiorari on October 4, 1993. Ford v. California, 510 U.S. 838, 114 S. Ct. 118, 126 L. Ed. 2d 83 (1993).

On May 5, 1997, petitioner filed a Petition for Writ of Habeas Corpus (the "1997 Petition") in this Court under Case No. 97-3386-JMI (SH). This Court dismissed the 1997 Petition without prejudice due to petitioner's failure to exhaust state remedies with respect to certain claims raised in the 1997 Petition.

On October 24, 1997, petitioner filed a petition for writ of habeas corpus in the California Supreme Court, which petition was denied on March 25, 1998. (M.D., Ex. E.)

## III. DISCUSSION

In its Motion to Dismiss, respondent asserts that the instant Petition must be dismissed because it was not filed within the statutory deadline. The Magistrate Judge agrees with the respondent's analysis, as shown below.

28 U.S.C. §2244, provides in relevant part:

(d)(1) A 1-year period of limitation shall apply to an



application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection. (Emphasis added)

Thus, Congress provided a one-year time limit for filing a habeas corpus petition in order to strengthen the policy favoring finality and comity. Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997).

Respondent submits that on October 4, 1993, petitioner's judgment became final on direct review.

As held in Beeler, the one-year period of limitations did not begin to run against petitioner until April 24, 1996, the date of the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Beeler, 128 F.3d at 1287. Thus, the statute of limitations began to run as to petitioner on April 24, 1996, and expired one year later on April 23, 1997. However, petitioner did not file the instant Petition in this Court until April 7, 1998, nearly one year beyond the one year

limitation period.

This Court notes that petitioner filed a habeas petition in the California Supreme Court on October 24, 1997. Plaintiff argues that under 28 U.S.C. § 2244(d)(2), the period of limitation was tolled until the California Supreme Court issued its judgment on March 25, 1998. However, no tolling benefit applies to petitioner because petitioner filed his habeas petition in the California Supreme Court on October 24, 1997, after the AEDPA statute of limitation had already expired.

This Court also notes that petitioner appears to be under the mistaken impression that the 1997 Petition filed in this Court somehow equitably tolled the applicable statute of limitations. (Opp., p. 3.) The 1997 Petition was dismissed without prejudice on October 8, 1997 due to petitioner's failure to exhaust his state remedies with respect to certain grounds.

In his Opposition, petitioner claims that he interpreted the Magistrate Judge's language (in the 1997 Report and Recommendation dismissing the 1997 Petition) that "[d]ismissal without prejudice is appropriate since petitioner may obtain the relief requested through a Petition for a Writ of Habeas Corpus to the California Supreme Court" as meaning that the "AEDPA's one-year limit could be equitably tolled." (See Report and Recommendation filed 9/9/97; see also Opp., p. 3.)

Petitioner's interpretation is incorrect. First of all, petitioner's filing of the 1997 Petition did not toll the AEDPA's statute of limitation. 28 U.S.C. § 2244(d)(2) provides that "State" post-conviction or other collateral review tolls the statute of limitation. See 28 U.S.C. § 2244(d)(2). The 1997 Petition was filed prematurely in this Court, as petitioner had not exhausted his state remedies with respect to certain claims.[1/]

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1. Petitioner also argues that despite the May 5, 1997 filing date of the 1997 Petition, he actually gave the 1997 Petition to prison officials on April 19, 1997, five days prior to the expiration of the statute of limitations. Petitioner's argument is irrelevant, because the claims set forth in the 1997



See Duncan v. Henry, 513 U.S. 364, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995). Second, this Court's dismissal of the 1997 Petition without prejudice in no way relieved petitioner from complying with the statutory deadline set forth in the AEDPA.

Beeler, supra, held that the one year period in which a state prisoner has to file a Petition for Writ of Habeas Corpus in the District Court constitutes a statute of limitations which may, in certain narrow circumstances, be tolled. Specifically, Beeler stated that "equitable tolling will only be granted if "extraordinary circumstances beyond a prisoner's control make it impossible to file a Petition on time. [citation omitted] We have no doubt that district judges will take seriously Congress' desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted." Beeler, 128 F.3d at 1288-89.

Petitioner alleges that he has had difficulty in obtaining "instructions pertaining to federal habeas corpus procedure", and well as in obtaining competent legal assistance. (Opp., p. 2.) However, these allegations do not constitute any "extraordinary circumstances" as envisioned by the Beeler court. See also Calderon v. United States District Court (Kelly) 127 F.3d 782 (9th Cir. 1997); United States v. Van Poyck, 980 F.Supp. 1108 (C.D.Cal. 1997).

Nor does petitioner argue that he fails within the statutory tolling provisions of §2244(d)(1)(C) or §2244(d)(1)(D). He does not assert that he is relying on a constitutional right newly recognized by the United States Supreme Court, or on a newly discovered factual predicate.

## RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this

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Petition had not been exhausted at the state level, and thus the filing of the 1997 Petition in federal court was premature.

Report and Recommendation; and (2) directing that Judgment be entered dismissing the action with prejudice.

DATED: 6/25/98

s/_____
STEPHEN J. HILLMAN
UNITED STATES MAGISTRATE JUDGE



FILED
JUN 29 1998

ENTERED
JUN 30 1998

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA-**
**WESTERN DIVISION**

| | | |
|---|---|---|
| RICHARD HERMAN FORD, | ) | CV 98-2556-RAP (SH) |
| | ) | |
| Petitioner, | ) | ORDER ADOPTING |
| v. | ) | REPORT AND |
| | ) | RECOMMENDATION |
| S. HUBBARD, Warden, | ) | OF UNITED STATES |
| | ) | MAGISTRATE |
| Respondent. | ) | JUDGE |
| | ) | |
| _____ | ) | |

Pursuant to 28 U.S.C. Section 636(b)(1)(C), the Court has reviewed the Petition, all of the records and files herein and the attached Report and Recommendation of the United States Magistrate Judge, and has made a de novo determination of the Report and Recommendation. The Court concurs with and adopts the conclusions of the Magistrate Judge.

IT IS ORDERED that the Petition filed herein is dismissed with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by the United States mail on petitioner and counsel for respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: 6-29-98

s/_____
RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE



FILED
JUN 29 1998

ENTERED
JUN 30 1998

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA-**
**WESTERN DIVISION**

| | | |
|---|---|---|
| RICHARD HERMAN FORD, | ) | CV 98-2556-RAP (SH) |
| | ) | |
| Petitioner, | ) | JUDGMENT |
| | ) | |
| v. | ) | |
| S. HUBBARD, Warden, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |
| _____ | ) | |

Pursuant to the Order of the Court adopting the conclusions and recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed with prejudice.

DATED: 6-29-98

s/_____
RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE

APPENDIX D

FILED
SEP- 9 1997

ENTERED
OCT 14 1997

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA-**
**WESTERN DIVISION**

| | | |
|---|---|---|
| R.H. FORD, | ) | CV 97-3386-RAP (SH) |
| | ) | |
| Petitioner, | ) | REPORT AND |
| | ) | RECOMMENDATION OF |
| v. | ) | UNITED STATES |
| | ) | MAGISTRATE JUDGE |
| S. HUBBARD, Warden | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

This Report and Recommendation is submitted to United States District Judge Richard A. Paez pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

## I. DISCUSSION

Petitioner filed the instant Petition for a Writ of Habeas Corpus on May 5, 1997. A Return was filed by respondent on June 20, 1997 alleging failure to exhaust state remedies.

After reviewing the Petition and the Return, the Magistrate Judge determined that Grounds 2, 3 and 8 through 12, inclusive, in the Petition had not been exhausted. (See OSC Re Further Proceedings ("OSC") filed August 4, 1997). Petitioner was

given the choice between dismissing the Petition without prejudice to refiling after exhaustion of the unexhausted grounds or proceeding on only the exhausted claims. If petitioner wished to waive the unexhausted claims and proceed only on the exhausted claims, he was to so notify the Court by August 22, 1997.

As of the date of this Report and Recommendation, the Court has received no indication that petitioner wishes to abandon the unexhausted claims. The Magistrate Judge informed the petitioner that if no response was received to the OSC, that it would be assumed the consented to dismissal of the Petition without prejudice.

Dismissal without prejudice is appropriate since petitioner may obtain the relief requested through a Petition for a Writ of Habeas Corpus to the California Supreme Court.

## RECOMMENDATION

Based upon the foregoing, it is hereby recommended that the Court enter an Order denying the Petition and dismissing this action without prejudice.

DATED: 9-9-97

s/_____
STEPHEN J. HILLMAN
UNITED STATES MAGISTRATE JUDGE



FILED
OCT- 8 1997

ENTERED
OCT 14 1997

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA-**
**WESTERN DIVISION**

| | | |
|---|---|---|
| R.H. FORD, | ) | CV 97-3386-RAP (SH) |
| | ) | |
| Petitioner, | ) | ORDER ADOPTING |
| | ) | REPORT AND |
| v. | ) | RECOMMENDATION |
| | ) | OF UNITED STATES |
| S. HUBBARD, WARDEN | ) | MAGISTRATE JUDGE |
| | ) | |
| Respondent. | ) | |
| | ) | |

Pursuant to 28 U.S.C. Section 636(b)(1)(C), the Court has reviewed the Petition, all of the records and files herein and the Attached Report and Recommendation of the United States Magistrate Judge, and has made a de novo determination of the Report and Recommendation. The Court concurs with and adopts the conclusions of the Magistrate Judge.

IT IS ORDERED that the Petition filed herein is dismissed without prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by the United States mail on Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: Oct. 8, '97

s/_____
RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE



FILED
OCT- 8 1997

ENTERED
OCT 14 1997

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA-**
**WESTERN DIVISION**

| | | |
|---|---|---|
| R.H. FORD, | ) | CV 97-3386-RAP (SH) |
| | ) | |
| Petitioner, | ) | JUDGMENT |
| | ) | |
| v. | ) | |
| | ) | |
| S. HUBBARD, WARDEN | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

Pursuant to the Order of the Court adopting the conclusions and recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed without prejudice.

DATED: Oct. 8, 97

s/_____
RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE

APPENDIX E

FILED
SEP 10 1997

ENTERED
SEPT 12 1997

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA-**

**WESTERN DIVISION**

| | | |
|---|---|---|
| RICHARD HERMAN FORD, | ) | CV 97-3385-RAP (SH) |
| | ) | |
| Petitioner, | ) | FINAL REPORT AND |
| v. | ) | RECOMMENDATION |
| | ) | OF UNITED STATES |
| S. HUBBARD, Warden, et al., | ) | MAGISTRATE JUDGE |
| | ) | |
| Respondents. | ) | |
| | ) | |
| | ) | |

This final Report and Recommendation is submitted to United States District Judge Richard A. Paez pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

## I. DISCUSSION

On May 5, 1997, petitioner, a prisoner in state custody, filed a Petition for Writ of Habeas Corpus (the "Petition") and a Motion to Stay Federal Habeas Corpus Petition Containing Exhausted Grounds While Petitioner Exhausts Unexhausted State Claims on State Appellate No. B033751 (the "Motion").

Respondent filed an Answer on June 4, 1997, and then an Amended Answer on June 12, 1997, which Amended Answer addressed the merits of petitioner's Motion.

After reviewing the Petition, the Motion and the Amended Answer, the Magistrate Judge determined that Grounds 4 and 7 (subparts 1-4), inclusive) presented in the Petition had not been exhausted. (See OSC Re Further Proceedings on a Partially Exhausted Petition filed 7/7/97 (the "OSC").) Petitioner was given the choice between dismissing the Petition without prejudice, and refiling after exhaustion of the unexhausted claims, or proceeding on only the exhausted claims. If petitioner wished to waive the unexhausted claims and proceed only on the exhausted claims, he was to so notify the Court by July 25, 1997.

Respondent filed a Return on July 15, 1997, reiterating that petitioner has failed to exhaust state remedies. This Court has reviewed the Return, and despite respondent's assertions that at least nine of petitioner's claims remain unexhausted, this Court finds that only Grounds 4 and 7 (subparts 1-4, inclusive) remain unexhausted. (See the OSC.)

On July 28, 1997, petitioner notified the Court that he desired to dismiss his Petition without prejudice so that he could exhaust the unexhausted claims. (See Petitioner's Return to Court Order Re Further Proceedings & Mot. For Extension of Time, filed 7/28/97.) Petitioner also filed a "Traverse to Return" on July 28, 1997, admitting that he has failed to exhaust several issues.

On August 5, 1997, the Magistrate Judge filed a Report and Recommendation, recommending that the Petition be dismissed without prejudice. On August 25, 1997, petitioner filed Objections to the Report and Recommendation.[1/] The

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1. On August 25, 1997, petitioner also lodged with this Court an Amended Petition for Writ of Habeas Corpus. With respect to the claims set forth in the Amended Petition, this Court finds that Ground 4 remains unexhausted (and petitioner concedes in the Objections that Ground 4 is in fact unexhausted) and Ground 7 (sub-claim A) remains unexhausted. For the reasons stated in this Final Report and Recommendation, this Court shall order the Amended Petition returned and rejected. (See this Court's Minute Order issued concurrently herewith).



Magistrate Judge now issues this Final Report and Recommendation.

A district court has discretion to Stay proceedings on a habeas containing only exhausted claims, in order to give a petitioner time to exhaust newly discovered claims in state court before amending the federal habeas petition. Greenwalt v. Stewart, 105 F.3d 1268, 1274 (9th Cir. 1997) (per curiam), citing Fetterly v. Paskett, 997 F.2d 1295, 1301-02 (9th Cir. 1993), cert. denied, 513 U.S. 914 (1994); see also Calderon v. U.S. District Court (Gordon), 107 F.3d 756, 761 n.10 (9th Cir. 1997) (as amended per Order, April 16, 1997, 1997 WL 183877).

However, a federal habeas petition must be dismissed if it contains even one unexhausted claim. See Coleman v. Thompson, 501 U.S. 722, 731, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); Castile v. Peoples, 489 U.S. 346, 349, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989); Rose v. Lundy, 455 U.S. 509, 522, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

The instant Petition contains both unexhausted and exhausted claims. Therefore, this Court does not have the discretion to Stay such a Petition, and dismissal of the instant Petition is required.

Dismissal without prejudice is appropriate since petitioner may obtain the relief requested through a Petition for Writ of Habeas Corpus to the California Supreme Court.[2/]

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2. In his Objections, petitioner maintains that he submitted a "Notice and Motion for Leave to Proceed-Relief from Default" to the California Supreme Court on August 1, 1997, requesting leave from such Court to submit a second Petition for Review. The California Supreme Court denied his request. However, petitioner is not foreclosed from presenting a Petition for Writ of Habeas Corpus to the California Supreme Court.

Petitioner's request for an extension of time to respond to the Return is denied at this time. At such time as petitioner filed a new Petition with this Court containing only issues that have been fully exhausted, petitioner shall be given an appropriate amount of time to respond to respondent's Return addressing the merits of the new Petition.

## II. RECOMMENDATION

Based upon the foregoing, it is hereby recommended that the Court enter an Order denying the Petition and dismissing the action without prejudice.

DATED: 9-10-97

s/_____
STEPHEN J. HILLMAN
UNITED STATES MAGISTRATE JUDGE

## NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file Objections as provided in the Local Rules Governing the Duties of the Magistrate Judges and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.



FILED
SEP 11 1997

ENTERED
SEP 12 1997

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA-**

**WESTERN DIVISION**

| | | |
|---|---|---|
| RICHARD HERMAN FORD, | ) | CV 97-3385-RAP (SH) |
| | ) | |
| Petitioner, | ) | ORDER ADOPTING |
| v. | ) | FINAL REPORT AND |
| | ) | RECOMMENDATION |
| S. HUBBARD, Warden, et al., | ) | OF UNITED STATES |
| | ) | MAGISTRATE JUDGE |
| Respondents. | ) | |
| | ) | |
| | ) | |

Pursuant to 28 U.S.C. Section 636(b)(1)(C), the Court has reviewed the Petition, all of the records and files herein and the attached Final Report and Recommendation of the United States Magistrate Judge, and has made a de novo determination of the Final Report and Recommendation. The Court concurs with and adopts the conclusions of the Magistrate Judge.

IT IS ORDERED that the Petition filed herein is dismissed without prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Final Report and Recommendation and the Judgment herein by the United States mail on Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: Sept. 11, 97

s/_____
RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE



FILED
SEP 11 1997

ENTERED
SEP 12 1997

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA-**

**WESTERN DIVISION**

| | | |
|---|---|---|
| RICHARD HERMAN FORD, | ) | CV 97-3385-RAP (SH) |
| | ) | |
| Petitioner, | ) | JUDGMENT |
| v. | ) | |
| | ) | |
| S. HUBBARD, Warden, et al., | ) | |
| | ) | |
| Respondents. | ) | |
| | ) | |
| | ) | |

Pursuant to the Order of the Court adopting the conclusions and recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed without prejudice.

DATED: Sept. 11, 97

s/_____
RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE